No. (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1994

SAC-CO INC., d/b/a ACME CASH REGISTER COMPANY,
f/k/a CBS LIQUOR CONTROL, INC.,

Petitioner,

against

AT&T GLOBAL INFORMATION SOLUTIONS COMPANY,
f/k/a NCR CORPORATION

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When only a portion of an arbitration award issued pursuant to the Federal Arbitration Act, 9 U.S.C. §§1, *et seq.* ("FAA") is invalid because beyond the arbitrator's power to make, is the court to be guided by FAA §10 (permitting partial vacation of an award), or by §11 (permitting modification of an award under certain circumstances), or by both?

2. Are §§ 10 and 11 of the FAA legally and anlytically distinct, complementary, or redundant?

3. When does a modification of an arbitration award of punitive damages "affect the merits of a controversy" within the meaning of §11 of the FAA?

4. When an arbitration award of punitive damages is invalid in part, should the Court simply invalidate the entire award, thus foreclosing further relief to the prevailing party, or should the matter be remanded for correction by the arbitrator?

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OPINIONS BELOW

The January 12, 1995 decision of the Court of Appeals, whose judgment is herein sought to be reviewed, is reported at 43 F.3d 1076, and is reprinted in the annexed Appendix to this Petition, pp. A1-A11. The Decision and Order of the District Court dated November 16, 1993, is reproduced in the Appendix at pp. A17-A33. The further Decision and Order of the District Court dated December 24, 1993 is reproduced at Appendix pp. A36-A41.

The Decision and Awards of Arbitrator, each dated November 8, 1980 are also reproduced at Appendix pp. A44-A75.

JURISDICTION

The Judgment of the Court of Appeals was entered January 12, 1995. Petitioner filed a timely Petition for Rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure, which was denied by Order entered February 21, 1995 (A14). This Petition for a writ of certiorari is filed within 90 days of the Order denying the petition for a rehearing. Supreme Court Rule 13.1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Sections 10 and 11 of the Federal Arbitration Act, 9 U.S.C. §§10, 11, which provide as follows:

> §10(a). In any of the following cases the United States Court in and for the district wherein the

award was made may make an order vacating the award upon the application of any party to the arbitration --

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone a hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the Court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may

make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in Section 572 of title 5.

§11. In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration --

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

STATEMENT OF THE CASE

This proceeding arose under the Federal Arbitration Act, 9 U.S.C. §§1, et seq. (hereinafter "FAA"), pursuant to which an arbitrator issued a decision and three awards on November 8, 1990.

Petitioner Sac-Co Inc., d/b/a Acme Cash Register Company, f/k/a CBS Liquor Control, Inc. (hereinafter referred to as "Acme"), and respondent AT&T Global Information Solutions Co., f/k/a NCR Corporation (hereinafter referred to as "NCR") each brought motions in the United States District Court for the Southern District of Ohio pursuant to 9 U.S.C. §10. The District Court had jurisdiction pursuant to 28 U.S.C. §1332, in that the amount in controversy exceeds $50,000, exclusive of interest and costs, and complete diversity of citizenship exists between the parties.

Petitioner Acme is a small, family owned cash register dealership. Respondent NCR Corporation, now known as AT&T Global Information Solutions Company, is a manufacturer of cash registers and related items.

In 1982, Acme and NCR entered into a dealership agreement by which Acme became a non-servicing dealer of NCR cash registers and related equipment. The dealership agreement contained an arbitration clause incorporating by reference the rules of the American Arbitration Association.

Because it was a non-servicing dealer, Acme, in NCR's behalf, sold service contracts to its customers. The contracts were to be performed by NCR service personnel.

In 1984, after Acme had expended substantial resources to build up a base of NCR customers, NCR directed its service organization to compete with its independent dealers for future sales. Within a very short time period, Acme's customer base was misappropriated by the very NCR service personnel Acme had placed in its customers' midst.

Acme thereafter sued NCR, alleging that NCR had, *inter alia*, engaged in unfair competition by usurping its customer base by illicit means, including acts of trade disparagement, and had nearly succeeded in destroying Acme's business.

The matter proceeded to arbitration in 1990, and the Arbitrator made an express finding that NCR had engaged in unfair competition against Acme by betraying the trust implicit in every dealership agreement: that is, customers are not to be stolen by manufacturers from the very dealers who have developed them through diligent effort and expenditure of resources. The arbitrator issued three separate awards. The first award assessed compensatory damages against NCR (for unfair competition) in the amount of $58,896.00, and the second assessed compensatory damages (for the cost of goods sold) against Acme in the amount of $10,710.95.

The third award was a punitive damages award against NCR. The structure and wording of the award are highly significant, and critical to the analysis of this case:

> 1. With respect to the claim of CBS Liquor Control, Inc. d/b/a Acme Cash Register Company, a punitive damage award in the sum of $1,335,180.00 is made against NCR Corporation.

2. Said award is to be distributed to such persons or entities, on an equal basis, who were non-servicing NCR dealers as of May 25, 1984.

3. NCR shall file an Affidavit of Compliance and a schedule showing the entities to whom this award is to be distributed with names, addresses and amounts so distributed.

Paragraph "1" of the award is in the same form as the corresponding paragraphs in the two compensatory awards. Paragraphs "2" and "3" of the award, whereby the Arbitrator proposed to distribute the punitive damages to nonparties in addition to Acme, were clearly beyond the Arbitrator's power to make, and both Acme and NCR moved to vacate those paragraphs.

The District Court confirmed the two compensatory awards, and they are not at issue here. With respect to the punitive damages award, NCR, seeking to avoid the punishment that had been rendered, asked that paragraph "1" of the award be vacated in addition to paragraphs "2" and "3", while Acme urged a more reasoned approach. If only paragraphs "2" and "3" were vacated, leaving paragraph "1", the award against NCR would remain intact and in a form identical to the two compensatory awards. The District Court agreed that paragraphs "2" and "3" were beyond the power of the Arbitrator to make, and must be vacated under FAA §10(a)(4). However, the Court felt that vacating only paragraphs "2" and "3" would constitute a "modification" of the award, and looked to FAA §11 to determine whether "modification" was proper under that section. The District Court concluded that §11 did not allow a "modification", and therefore vacated the award in its entirety.

The Court of Appeals affirmed, expressly rejecting Acme's argument that the case was governed by FAA § 10 (see A7), and instead, without critical analysis, simply repeated the District Court's rationale that §11 would not allow such a "modification" of the award. The Court of Appeals failed entirely to address Acme's argument that "partial vacatur" and "modification" are structurally and analytically distinct as a matter of law.[1] The Court relied on §11(c), which allows the modification of an award which "is imperfect in matter of form not affecting the merits of the controversy," and the last clause of §11 which provides that, upon a modification, "[t]he order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties."

The Court of Appeals held, essentially, that vacating only the offending paragraphs would somehow "affect the merits of the controversy," deemed by the panel to be forbidden by §11. It further thought that this less drastic approach would "increase" the award to Acme, which would not "effect the intent" of the Arbitrator, who indicated that he had not awarded the punitive damages "in favor of" Acme. The Court gave no consideration to the fact that the purpose of punitive damages is to punish and deter wrongdoing; hence, such damages are always rendered "against" one party and not "in favor of" the other party. The Court likewise ignored general severability language contained in the arbitrator's award, dismissing it as an attempt to, in the Panel's words, "trump" §11.[2]

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[1]Section 10 deals with fundamental errors; §11 deals with technical errors.

[2]The language the Court of Appeals dismissed so readily, while supposedly effectuating the Arbitrator's intent, was this: "If any part of this decision and awards made thereupon is determined to be void, illegal, or

Acme asked in the alternative that the matter be remanded to the Arbitrator to determine what he would have done had he known that his improper direction would be stricken. The Court of Appeals simply held that there was nothing ambiguous in the Arbitrator's decision, and denied the remand, thus foreclosing any further relief and assuring that NCR will remain unpunished.

REASONS FOR GRANTING THE WRIT

I.

CERTIORARI SHOULD BE GRANTED TO RESOLVE CONFLICTS AMONG THE LOWER COURTS AS TO THE PROPER MEANS OF ANALYZING ARBITARTION AWARDS WHICH ARE INVALID ONLY IN PART.

With its decision in this case, the Sixth Circuit has effectively rejected the approach adopted by other Courts of Appeals and District Courts in their analysis of arbitration awards invalid only in part. As the court indicated in Enterprise Wheel & Car Corp. v. United Steel Workers of Am., 269 F.2d 327 (4th Cir. 1969), *rev'd in part on other grounds*, 363 U.S. 593 (1960):

> The view now prevailing is that even if the award exceeds the scope of the arbitration agreement it is not invalid *in toto* but only so far as it is excessive, if it is of such character that the court can separate the part within from the part beyond

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beyond my power to make, then the remainder shall be severed and considered valid notwithstanding the impropriety of the part so struck down."

> the submission. [citations omitted]. It follows that the award in this case should not be stricken down completely if the valid and invalid parts can be separated by the court.

269 F.2d at 330. The other courts to address the proper approach have agreed with the Enterprise Wheel rule. Orion Shipping & Trading Co. v. Eastern States Petroleum Corp., 312 F.2d 299 (2d Cir.), cert. denied, 373 U.S. 949 (1963); Moyer v. Van-Dye-Way Corp., 126 F.2d 229 (3d Cir. 1942); Refino v. Fever Transp., Inc., 480 F. Supp. 562 (S.D.N.Y. 1979), aff'd, 633 F.2d 205 (2d Cir. 1980); Puerto Rico Maritime Shipping Auth. v. Star Lines, Ltd., 454 F. Supp. 368 (S.D.N.Y. 1978); Behring Int'l., Inc. v. Local 295, Int'l Bhd. of Teamsters, 449 F. Supp. 513 (E.D.N.Y. 1978); Swift Indus., Inc. v. Bottony Indus., Inc., 325 F. Supp. 577 (W.D. Pa. 1971), aff'd, 466 F.2d 1125 (3d Cir. 1972). *See also* Industrial Mut. Ass'n v. Amalgamated Workers, Supp. 725 F.2d 406, 412 (6th Cir. 1984) (In context of labor arbitration award, "rather than vacating an entire award when only a portion is defective, the better practice is to excise that which cannot be enforced and leave intact the remaining, valid portion of the award")

True to the framework for analysis established by the foregoing cases, Acme argued that the award of punitive damages was easily severable from the Arbitrator's *ultra vires* direction that those damages be given away to non-parties. The Court of Appeals instead deviated from the established precedents by announcing a proposition unknown under FAA or labor arbitration jurisprudence. The Court held that a request that an award be partially vacated, because the invalid part is beyond the Arbitrator's power under FAA §10(a)(4), must be analyzed in conjunction with §11, to determine whether such a partial vacatur would be a permissible "modification."

The Court of Appeals' decision also does something else no other court has done. It takes §11, which is a permissive provision allowing modification of awards under certain circumstances, and turns it into a *prohibition*. Grasping onto the second clause of §11(c), the Court of Appeals found that §11 "forbids modifying an award when the modification will affect the merits of the controversy." No party suggested that the award in this case was "imperfect in matter of form," so there was no logical reason to look to §11(c). The Court of Appeals had no need to attempt to squeeze an analysis of this case within the context of §11, when the proper framework for analysis was §10, subject to the principles of partial vacatur adopted by the other lower court cases to have addressed the issue.

If the Court of Appeals' decision stands, there will be two competing precedents: the majority rule, which holds that the reviewing court should invalidate only so much of an arbitration award as is beyond the Arbitrator's power to make; and the decision of the Sixth Circuit in this case, which holds that an award may only be vacated in part if the partial vacatur will fit into one of the cubbyholes found in §11, an approach unknown in the law and deficient in logic.

II.

THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The modern rule discussed above, to the effect that a partially invalid arbitration award should only be vacated in part, has its genesis in earlier decisions of this Court, as cited by the Court of Appeals for the Fourth Circuit in Enterprise Wheel, *supra*: Lyle v. Rodgers, 5 Wheat 394, 18 U.S. 394, 409, 5

L.Ed. 117, 121 (1820); McCormick v. Gray, 13 How. 26, 54 U.S. 26, 39, 14 L.Ed. 36, 41 (1851); New York & Cumberland R. Co. v. Meyers, 18 How. 246, 59 U.S. 246, 252, 15 L.Ed. 380, 383 (1855); DeGroot v. United States, 5 How. 419, 72 U.S. 419, 430-31, 18 L.Ed. 700, 703 (1866). Although the cases were decided prior to the adoption of the Federal Arbitration Act in 1947, C. 392, §1, 61 stat. 669, it is evident that the modern rule pertaining to the treatment of arbitration awards invalid only in part has a firm grounding in the common law, as enunciated by this Court. The Court of Appeals' decision has grossly deviated from that common law.

III.

THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

As indicated above, petitioner respectfully submits that §11 should not even enter into the court's analysis. However, by reaching the §11 question, the Court of Appeals made a determination which has never been made by another court: that is, when does a proposed modification "affect the merits of the controversy?". The Court of Appeals' decision treated the answer as obvious: "Here, vacating the award to the non-parties would result in an over $1 million judgment to Acme; *clearly a modification that would affect the merits of the controversy.*" (Court of Appeals' decision at p. 8) (emphasis added). Despite comprehensive research, the undersigned has been unable to find any authority, either in the arbitration area or in analogous areas, which would shed any light on the question as to whether a proposed modification would, within the meaning of §11, "affect the merits of the controversy." This is a matter of first

impression deserving of more than the conclusory resolution given to it by the Court of Appeals.

The proposed partial vacatur would not "affect the merits of the controversy." The "merits of the controversy," to the extent relevant here, were that NCR had been guilty of unfair competition in its dealings toward Acme, and punitive damages were assessed against NCR. Thus, the "merits of the controversy" were determined by the Arbitrator. To the extent the Arbitrator gave away Acme's award to others, the award was beyond his power and had nothing to do with the controversy itself, which was between NCR and Acme. Had the Arbitrator awarded punitive damages against NCR, then declared that he did not want Acme to have the damages, and then further directed that Acme bring the money into the public square and burn it, would the court, in deference to the Arbitrator's "intent" be precluded from doing justice by vacating that non-sensical direction?

The Court of Appeals stated that a "modification" was not permitted because the "modification" would not effect the Arbitrator's intent that the award go to others in addition to Acme.[3] However, the Arbitrator also intended that NCR be punished,but that intent was frustrated by the Court of Appeals' decision. The Court of Appeals ignored this argument. The Arbitrator also expressed the clear intent, expressed in his severability language, that the award be severed and vacated only in part; the Court of Appeals held, however, that his intent in that regard was irrelevant. Acme then asked that the matter be remanded to the arbitrator to determine his true "intent," but the

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[3]This is despite the fact that, as the Court of Appeals also held, the Arbitrator had no right to implement that "intent."

Court of Appeals held that his intent was unambiguous, and that a remand would serve no purpose. This issue of the Arbitrator's "intent," a factor to be considered under FAA §11, is an interesting one and an important one. The Court of Appeals lost the opportunity to explore it, however, by its cursory treatment of the subject matter.

The issue of an arbitrator's power to award punitive damages is of generally great interest at this time. Although the Court of Appeals' decision does not reach the issue, perhaps the unstated premise behind the decision can be found in the concurring opinion, wherein the concurring judge questions the wisdom of having an arbitrator award punitive damages at all in a commercial context (Decision at p. 11).[4] Despite the apparent hostility of the Court of Appeals to punitive damages in the arbitration context, this Court, in Mastrobuono v. Shearson Lehman Hutton, Inc., --U.S.--, 115 S.Ct. 1212, 131 L.Ed.2d 76, 63 U.S.L.W. 4195 (March 6, 1995) finally resolved a conflict of long-standing among the Courts of Appeal by holding that the FAA does allow the awarding of punitive damages. Indeed, this Court has, in recent years, interpreted the Federal Arbitration Act to give great leeway to the power of arbitrators. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Southland Corp. v. Keating, 465 U.S. 1 (1984). The Court of Appeals' decision in this case constitutes a deviation from the modern trend.

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[4] Cf. the same judge's concurring opinion in Cantrell v. GAF Corp., 999 F.2d 1007, 1019-20 (6th Cir. 1993), wherein he submits a similar distaste for punitive damages.

The Court of Appeals also refused to remand the matter to the Arbitrator to determine what his true "intent" was, in light of the fact that, as all parties agreed, he had no power to direct that the award be distributed to non-parties. The Court of Appeals held that his intent was unambiguous, and refused to remand the matter, despite precedent to the contrary. Olympia & York Florida Equity Corp. v. Gould, 776 F.2d 42, 45 (2d Cir. 1985); Diapules Corp. of America v. Carba Ltd., 626 F.2d 1108, 111 (2d Cir. 1980). The manifest injustice of the Court of Appeals' determination becomes evident when one places the matter in perspective. Acme and NCR agreed to arbitration. The Arbitrator was hired, and substantial resources were expended in submitting the matter for his determination. He was paid for his work. NCR sought compensatory damages; Acme sought compensatory and punitive damages. The Arbitrator generally performed the duties for which he was hired. He then, unfortunately, stepped beyond his powers and, in effect, *gave Acme's award away*, apparently in order to "dispense his own brand of industrial justice," something an arbitrator may not do. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960). As a result of the Court of Appeals' decision, Acme has no remedy for the Arbitrator's absurd, *ultra vires* experiment. The Court of Appeals' decision precludes the correction of this Arbitrator's error. Submission to the arbitration process now becomes a gamble. Parties must gamble that their arbitrators will not do anything absurd, because apparently there will not be a second chance. Acme has truly been deprived of the benefit of its bargain, all because the Arbitrator, after doing his job, went off on a tangent. Parties truly become hostage to the whims of individual arbitrators.

CONCLUSION

Congress, by passing the Federal Arbitration Act, expressed a clear intention to favor and enforce agreements to arbitrate. The Courts, construing the act, have conferred broad powers upon arbitrators and have given great deference to their determinations. The danger with such a system, however, is that the rule of law will succumb to the whims of individual arbitrators. There must be a method to correct aberrant behavior other than by the expedient of invalidating the entire process, leaving the parties without a remedy. The Court of Appeals in this case disregarded its obligation to do justice, by simply vacating the Arbitrator's entire award. He awarded punitive damages, which he had the power to do. He directed that they be paid to persons other than the party to the arbitration, Acme, who brought about the result. That, he had no power to do. The proper remedy, one that is consistent with precedent, notions of justice, and common sense, was to invalidate the invalid direction and uphold the punitive damages award. We respectfully request that this Court reconcile the conflict among the circuits as to the treatment of such awards, and, in so doing, promote the ends of justice.

Dated: Binghamton, New York
May 17, 1995

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Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1994 FED App. 0432P (6th Cir.)
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No. 94-3031

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NCR CORPORATION,
Plaintiff-Appellee,

v.

SAC-CO., INC., d/b/a Acme Cash Register Company f/k/a CBS Liquor Control, Inc.,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed January 12, 1995

Before: WELLFORD, RYAN, and BATCHELDER, Circuit Judges.

RYAN, J., delivered the opinion of the court, in which BATCHELDER, J., joined. WELLFORD, J. (p. 11), delivered a separate concurring opinion.

RYAN, Circuit Judge. In this diversity action to vacate and confirm arbitration awards, Sac-Co, Inc. appeals the

magistrate judge's judgment vacating the award of punitive damages ordered by an arbitrator. We are asked to determine whether (1) the magistrate judge erred in vacating the arbitrator's entire punitive damages award, and (2) whether the case should be remanded to the arbitrator. We conclude that the magistrate judge properly vacated the entire punitive damages award. Therefore, the judgment of the magistrate judge is affirmed.

I.

NCR Corporation is a manufacturer and seller of data processing equipment, including electronic cash registers. NCR entered into a dealer agreement with Sac-Co (hereinafter "Acme") in which NCR appointed Acme to be an authorized, nonexclusive dealer for the purchase and resale of NCR equipment. The agreement provided for arbitration of any dispute arising out of the agreement.

On April 26, 1989, NCR filed an action against Acme in the Supreme Court of the State of New York seeking payment for monies due under a promissory note and payment deferral agreement. Acme counterclaimed against NCR alleging a variety of claims including unfair competition and tortious interference with contractual relations. Acme claimed that NCR engaged in unfair competition by improperly soliciting Acme's clients and disparaging Acme's products. NCR filed a motion to stay Acme's counterclaim pending arbitration and to arbitrate its collection claims. The court granted the motion, and the parties pursued the matter in arbitration.

The arbitrator found for NCR on its claim and awarded NCR $10,710. The arbitrator then found NCR liable on Acme's counterclaim and awarded Acme $58,896 in compensatory damages in addition to the expenses of arbitration. The arbitrator also assessed punitive damages against NCR in the amount of $1,335,180, stating:

> the Arbitrator believes that NCR Corporation, while not acting maliciously in determining in 1984 to allow FEs to sell in competition with

> dealers that it had just recently recruited, does believe that NCR had not evidenced a sufficient sensitivity to the rights of others in making its corporate decisions.

The arbitrator found that NCR's conduct "was not aimed at Acme specifically but was [aimed] at all of its non-servicing dealers." Based on this finding, the arbitrator ordered NCR to pay punitive damages to all of NCR's United States nonservicing dealers even though only one nonservicing dealer, Acme, was a party to the action before the arbitrator. Plainly suspicious of his authority to make such an award to nonparties, the arbitrator stated:

> It is my intention in this decision and subsequent award, to fashion a punitive damages award which is unique to my own research but will do justice and utilize arbitration's flexibility to neither be unfair to NCR nor unjustly reward or provide a windfall to Acme.

The arbitrator further explained:

> It should be specifically noted that the damages which I have labeled punitive, I have awarded against NCR. *I have not awarded them in favor of Acme* and that is a conscious decision. It is not acceptable, in this Arbitrator's view, to give the Plaintiff a windfall simply in order to accomplish the deterrence role of punitive damages.

The arbitrator's award of punitive damages was based on the following formula: the estimated profit potential of each NCR field engineering office multiplied by 10. The number 10 was the estimated number of nonservicing dealers that would share in the award. There were an estimated 100 to 150 nonservicing dealers. However, the arbitrator believed that multiplying the profit potential times 100 or 150 would unjustly punish NCR.

On January 16, 1991, NCR filed a motion in the United States District Court for the Southern District of Ohio seeking to vacate the compensatory and punitive damages awards. Acme filed an Application and Motion to Confirm in Part and to Vacate in Part the arbitration awards. Both parties agreed that the arbitrator exceeded his authority and acted in manifest disregard of the law in awarding punitive damages to nonparties. Acme requested that the district court award all of the punitive damages to Acme.

The magistrate judge vacated the punitive damages award, finding that the arbitrator exceeded his powers in awarding damages to nonparties. The magistrate judge refused, however, to award all of the punitive damages to Acme because: (1) the Federal Arbitration Act does not authorize courts to modify the substance of arbitration awards, and (2) the arbitrator's express intent was to not award all of the punitive damages to Acme because he did not want Acme to get a "windfall." The magistrate judge also confirmed the compensatory damages awards against both parties. Only the punitive damages are in issue in this appeal.

Acme filed a motion for reconsideration which the magistrate judge denied, stating that rewriting the award to give Acme all of the punitive damages "would be so gross a modification of the substance of the award as to be an inappropriate judicial review of the substance of an arbitration award." The court also rejected Acme's request for a remand to the arbitrator, stating that a remand is only appropriate when necessary to clarify an ambiguity in an award.

Acme appeals from the magistrate judge's decision vacating the punitive damages award and denying a remand.

II.

The standard of review in arbitration cases is generally extremely narrow. *Dobbs, Inc. v. Local No. 614, Int'l Bd. of Teamsters*, 813 F.2d 85, 86 (6th Cir. 1987)(quoting

Anaconda Co. v. District Lodge No. 27, Int'l Ass'n of Machinists & Aerospace Workers, 693 F.2d 35, 36 (6th Cir. 1982)). "[T]hat a court is convinced [the arbitrator] committed serious error does not suffice to overturn his decision." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

However, an order to vacate an arbitration award is reviewed with more scrutiny. Many circuits review an order to vacate an arbitration award *de novo*. *See, e.g., Bowles Fin. Group, Inc. v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1012 (10th Cir. 1994); *Gulf Coast Indus. Workers Union v. Exxon Co.*, 991 F.2d 244, 248 (5th Cir.), *cert. denied*, 114 S. Ct. 441 (1993); *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 145 (4th Cir. 1993); *Employers Ins. of Wausau v. National Union Fire Ins. Co.*, 933 F.2d 1481, 1485 (9th Cir. 1991).

A court's power to *vacate* an arbitration award is almost exclusively confined to the four grounds specified in the Federal Arbitration Act, 9 U.S.C. § 10 (Supp. 1994). Additionally, a court may vacate an award if the conduct of the arbitrator constitutes "'manifest disregard'" of applicable law. *Pontiac Trail Medical Clinic, P.C. v. Painewebber, Inc.*, No. 92-1972, 1993 U.S. App. LEXIS 20280, at *7 (6th Cir. July 29, 1993)(unpublished disposition)(quoting *National R.R. Passenger Corp. v. Chesapeake & Ohio Ry. Co.*, 551 F.2d 136, 141-42 (7th Cir. 1977)). We think, therefore, that *de novo* is the correct standard of review of an order vacating an arbitration award.

9 U.S.C. § 10 provides, in part:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--
>
> (1) Where the award was procured by corruption, fraud, or undue means.

> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
>
> (5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Section 10(a)(4) provides that an award may be vacated where the arbitrators exceeded their powers. Some circuits have specifically held that arbitrators exceed their powers when they determine rights and obligations of individuals who are not parties to the arbitration proceedings. In *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Panama*, 312 F.2d 299 (2d Cir.), *cert. denied*, 373 U.S. 949 (1963), the court stated: "[A] decision whether parties other than those formally signatories to an arbitration clause may have their rights and obligations determined by an arbitrator when that issue has not been submitted to him is not within the province of the arbitrator himself but only of the court." *Id.* at 301.

Similarly, the Eighth Circuit in *International Brotherhood of Electrical Workers, Local No. 265 v. O.K. Electric Co.*, 793 F.2d 214 (8th Cir. 1986), held that an arbitrator's award was not enforceable against an employer who was not a party to a collective bargaining agreement, to grievance proceedings, or to the arbitration. *Id.* at 216.

The parties agree that the arbitrator exceeded his powers when he awarded punitive damages to nonparties and that the magistrate judge properly vacated the punitive damages award to nonparties. No other nonservicing dealer joined Acme in submitting a claim to the arbitrator or in filing suit against NCR. Essentially, the arbitrator awarded a class action type relief in a case that was not a class action. Thus, the arbitrator exceeded his authority by resolving a dispute which may or may not have existed between NCR and its other nonservicing dealers, and by determining the rights of individuals who were not parties in the arbitration proceedings. Because of this unauthorized act, under the statutory language of both § 10 and § 11 of the Federal Arbitration Act, the magistrate judge correctly concluded that he had the authority to vacate the award.

Acme argues that the magistrate judge erred in vacating the entire award. Rather, Acme claims, the magistrate judge should have vacated the award "in-part"; specifically, the magistrate judge should have vacated only the portion of the award concerning nonparties. Acme submits that 9 U.S.C. § 10, which addresses when a court may vacate an award, governed the case, instead of 9 U.S.C. § 11 (1970), which addresses when a court may modify an award. We reject Acme's argument that vacating an award "in-part" is governed by § 10. Vacating an award "in-part," at least as requested by Acme in this case, is synonymous with modifying an award and is, therefore, governed by § 11.

A court's power to *modify* an arbitration award is confined to the grounds specified in § 11. 9 U.S.C. § 11 provides:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration--
>
> (a) Where there was an evident material miscalculation of figures or an evident material

> mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
>
> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

The magistrate judge correctly concluded that he did not have the authority to modify the award under § 11 for several reasons. First, § 11 forbids modifying an award when the modification will affect the merits of the controversy. Modifying the award in this case would affect the merits of the controversy. Here, vacating the award to the nonparties would result in an over $1 million dollar judgment to Acme; clearly a modification that would affect "the merits of the controversy." Second, under the last paragraph of § 11, increasing the award to Acme would not "effect the intent" of the award made by the arbitrator. The arbitrator specifically stated that:

> It should be specifically noted that the damages which I have labeled punitive, I have awarded against NCR. *I have not awarded them in favor of Acme* and that is a conscious decision. It is not acceptable, in this Arbitrator's view, to give the Plaintiff a windfall simply in order to accomplish the deterrence role of punitive damages.

For this court to modify the award and grant the punitive damages award in its entirety to Acme would provide the windfall to Acme which the arbitrator expressly rejected.

Acme also argues that the magistrate judge erred in refusing to sever the offending portion of the award to nonparties. Acme asks this court to abide by the severability provision in the arbitration award. In his award, the arbitrator included the following language: "If any part of this decision and awards made thereupon is determined to be void, illegal or beyond my power to make, then the remainder shall be severed and considered valid notwithstanding the impropriety of the part so struck down."

Acme suggests that the provision awarding punitive damages to nonparties should be severed as it was beyond the arbitrator's power to make. We reject Acme's request to sever only the named recipients of the award--the nonparties--with the result that the entire award would accrue to Acme. To follow this course would amount to a modification of the award which, as we have said, is impermissible under 9 U.S.C. § 11. The severability provision in the arbitration award does not trump the law governing modification of arbitration awards, as set out in 9 U.S.C. § 11.

III.

Acme argues that if this court is unwilling to redistribute the award of punitive damages to Acme, it should remand the case to the arbitrator for him to clarify the result he intended.

A court may only remand a case back to the arbitrator when an arbitration award is ambiguous. *United Steelworkers Local 4839 v. New Idea Farm Equip. Corp.*, 917 F.2d 964, 968 (6th Cir. 1990); *Cleveland Paper Handlers & Sheet Straighteners Union No. 11 v. E.W. Scripps Co.*, 681 F.2d 457, 460 (6th Cir. 1982).

The award in the case at hand is not ambiguous. The decision is clear that Acme is entitled to $58,896 in compensatory damages in addition to the expenses of arbitration, and that NCR is entitled to $10,710. It is also clear that the arbitrator assessed punitive damages against

NCR in the amount of $1,335,180 to a class of NCR dealers not parties to the arbitration. Thus, remand is not an appropriate remedy.

Accordingly, the judgment of the magistrate judge is **AFFIRMED**.

HARRY W. WELLFORD, Circuit Judge, concurring. On appeal, NCR challenged the arbitrator's power to award punitive damages in the first place, asking this court to limit the arbitrator's power to award punitive damages in contractual settings.

I am certainly sympathetic to NCR's argument that empowering arbitrators to award punitive damages in a contractual setting is ill-advised. Much of my reservations may derive from a hesitancy to award punitive damages in a contractual setting between two equally sophisticated parties (absent bad faith). I am even more reluctant to allow non-judicial officers to make these decisions, as our ability to review these decisions is greatly circumscribed by the Federal Arbitration Act, 9 U.S.C. § 1, *et. seq.*

As of yet, this circuit has not needed to interpret Rule 43 of the American Arbitration Association, which states that "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including but not limited to specific performance of a contract." And we need not do so in this case, as we have decided to vacate the punitive damages award on other grounds.

Until such a need arises, I would warn potential parties that wish to limit the power of their arbitrators to issue punitive damages to state specifically their intentions. Arbitrators are limited to the powers the parties confer on them. *Baravati v. Josephthal, Lyon., & Ross, Inc.*, 28 F.2d 704, 709 (7th Cir. 1994) (explaining that the parties could have limited the arbitrator's power to award punitive damages because "parties can stipulate to whatever procedures they want to govern the arbitration of their disputes").

I concur in vacating the punitive damages award under the circumstances of this case.

Judgment appealed from, January 12, 1995

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No: 94-3031

NCR CORPORATION,

Plaintiff - Appellee,

v.

SAC -CO, INC., d/b/a Acme Cash Register Company f/k/a CBS Liquor Control, Inc.,

Defendant - Appellant.

Filed

January 12, 1995

Leonard Green, Clerk

Before: **Wellford, Ryan,** and **Batchelder**, Circuit Judges.

JUDGMENT

ON APPEAL from the United States District Court for the Southern District of Ohio at Dayton.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

Judgment appealed from, January 12, 1995

ON CONSIDERATION WHEREOF, it is ORDERED that the judgment of the magistrate judge is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Issued as Mandate: March 1, 1995
COSTS: None

A True Copy
Attest:

Filing Fee . . . . .$
Printing . . . .$

/s/ Valerie Field
Deputy Clerk

Total . . . .$

Order of the Court of Appeals on rehearing
February 21, 1995

No. 94-3031

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NCR CORPORATION,

Plaintiff-Appellee,

v.

SAC-CO, INC., D/B/A ACME CASH REGISTER COMPANY F/K/A CBS LIQUOR CONTROL, INC.,

Defendant-Appellant.

Filed

February 21, 1995

Leonard Green, Clerk

ORDER

BEFORE: WELLFORD, RYAN, and BATCHELDER, Circuit Judges.

Order of the Court of Appeals on rehearing
February 21, 1995

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

Decision and Order of the District Court
November 16, 1993

Filed: November 17, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

NCR CORPORATION,

Petitioner, :Case No. C-3-9 1-027

- vs -

Magistrate

Judge Michael R. Merz
CBS LIQUOR CONTROL, INC.,
dba ACME CASH REGISTER CO.,

Respondent. :

SAC-CO, INC.,
dba ACME CASH REGISTER CO.,

Applicant/Movant, :Case No. C-3-91-031

- vs -

Magistrate

Judge Michael R. Merz
NCR CORPORATION,

Respondent.

DECISION AND ORDER CONFIRMING IN PART AND VACATING IN PART ARBITRATION AWARDS

These actions were brought respectively by NCR Corporation and Sac-Co., Inc., doing business as Acme Cash Register Co. ("Acme"),[5] to vacate or confirm arbitration awards between them.

NCR is a Maryland corporation with its principal place of business in Dayton, Ohio; Acme is a New York corporation. This Court thus has subject matter jurisdiction of these controversies by virtue of the parties' diverse citizenship. 28 U.S.C. §1332. NCR initially brought an action to vacate in federal court in New York, but that action has been dismissed and the parties agree venue is proper in this Court. The cases have been consolidated without objection (Doc. #7). The parties have unanimously consented to magistrate judge trial authority under 28 U.S.C. §636(c) and the case has been referred on that basis (Doc. #14). The issues have been thoroughly briefed by the parties, which briefs have been supplemented by oral argument (transcribed at Doc. #27) and subsequent correspondence with the Court, and are now ripe for decision.

[5]Sac-Co., Inc., is the present corporate name of the entity previously known as CBS Liquor Control, Inc.

Decision and Order of the District Court
November 16, 1993

PROCEEDINGS IN ARBITRATION

The following facts are established by the record:

NCR manufactures and distributes business machines, including cash registers. In 1982 Acme entered into an agreement (Ex. A to Doc. #2) to be a non-servicing dealer for NCR's cash registers. At the time, NCR's own service people did not sell NCR cash registers, but in 1984 they were authorized to do so in competition with non-servicing dealers, but not in competition with NCR's own sales personnel. In 1988 NCR amended the terms on which it did business with non-servicing dealers and Acme did not continue to be such a dealer. NCR considered Acme in default on a note from some financing in 1987 and sued Acme in New York state court on the note in April, 1989 (See Complaint, Ex. B to Doc. #2). Acme filed counterclaims alleging, *inter alia*, unfair competition (Ex. C. to Doc. #2) and seeking compensatory and punitive damages. NCR moved the New York Supreme Court to stay the litigation pending referral of all the matters to arbitration and asked the court to enforce the arbitration clause of the 1982 Agreement. On November 24, 1989, the court granted that relief (Exs. D & E to Doc. #2).

NCR then demanded arbitration under the Commercial Arbitration Rules of the American Arbitration Association (Demand, Ex. F to Doc. #2). The AAA ordered the proceeding held in New York and Robert Ganz, an attorney from Albany, was duly designated as the single arbitrator. The parties filed pre-hearing memoranda briefing the issues they believed involved (Exs. H & I to Doc. #2).

NCR attempted to defeat Acme's counterclaims on the basis of the statute of limitations and Arbitrator Ganz ordered additional briefs on the statute of limitations questions (Exs. K & L to Doc. #2). The parties filed those briefs (Exs. M & N to Doc. #2) and Arbitrator Ganz rendered a Decision on September 19, 1990 (Ex. O to Doc. #2). He noted that the 1982 Agreement contained no choice of law clause which could have made New York law expressly applicable. He also noted that the 1982 Agreement had no contractual time bar on demands for arbitration, although such clauses are common and enforceable. He concluded that a "door-closing" mechanism such as a statute of limitations should not be employed in this arbitration. NCR requested reconsideration which Acme opposed and the Arbitrator denied (Exs. P, Q, & R to Doc. #2).

After a very extensive hearing consuming a number of trial days, Arbitrator Ganz rendered a Decision and three Awards on November 8, 1990 (Exs. AA, BB, CC, and DD to Doc. #2). The first award grants NCR $10,710.95 on its claims against Acme. The second award grants Acme $58,896.00 in compensatory damages on its counterclaims. The third award is for $1,335,180.00 in punitive damages against NCR but in favor, equally, of all those persons or entities "who were non-servicing NCR dealers as of May 25, 1984." These proceedings followed.

POSITIONS OF THE PARTIES

Both parties agree the award of punitive damages to non-parties to the arbitration must be vacated.

In addition, NCR contends that the punitive damages award must be vacated altogether because arbitrators have no authority to award punitive damages, because the facts found by Arbitrator Ganz do not support an award of punitive damages under New York law, because the Arbitrator's theory of punitive damages was based on his theory of compensatory damages on which NCR was not given an opportunity to present evidence, and because the award is asserted to violate the Due Process Clauses of the Fifth and Fourteenth Amendments.

NCR contends the compensatory damage award must also be vacated because it is based on a theory adopted by the arbitrator without permitting NCR to put on evidence and because the arbitrator assertedly acted in manifest disregard of the law when he refused to apply the New York (or any) statute of limitations to Acme's counterclaims. If these two awards are vacated, NCR is willing to give up the $10,000 award in its favor.

Acme reminds the Court that its role in reviewing an arbitrator's award is quite limited. It contends that the compensatory damages award should be confirmed because it falls within the range of damages even NCR's expert witness discussed. As to the punitive damages award, Acme asserts the power of arbitrators acting under the Federal Arbitration Act to grant punitive damages is widely accepted and should be recognized by this Court. While agreeing that punitive damages cannot be awarded to non-parties, it asserts that portion of the award is readily severable and doing so will carry out the arbitrator's intention of punishing NCR.

OPINION

> Broadly speaking, arbitration is a contractual proceeding, whereby the parties to any controversy or dispute, in order to obtain an inexpensive and speedy final disposition of the matter involved, select judges of their own choice and by consent submit their controversy to such judges for determination, in place of the tribunals provided by the ordinary processes of law.

Gates v. Arizona Brewing Co., 54 Ariz. 266, 269, 95 P. 2d 49, 50 (1939), quoted at Wilner, DOMKE ON COMMERCIAL ARBITRATION (rev. ed.), § 1.01 (hereinafter "Domke"). Because arbitration is a matter of contract in the first instance, the Court's analysis must begin with the parties' contract. The 1982 Agreement provides at ¶15:

> Should any dispute occur between the parties arising out of or related to this Agreement, or their rights and responsibilities to each other, the matter shall be settled and determined under the then current rules of the American Arbitration Association providing that the arbitrator selected shall be knowledgeable in the field of business information and data processing systems. The decision of the Arbitrator shall be held, and the award shall be deemed to be made, in Dayton, Ohio unless otherwise agreed.

(Ex. A. to Doc. #2, p.7). Very significantly, the 1982 Agreement has no choice of law clause and no contractual limitation on the time within which a claim may be made under the contract.

Both parties brought their actions in this Court under the Federal Arbitration Act, 9 U.S.C. § 1, et seq. (the "FAA"). The purpose of the FAA was "to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate." *Volt Info Sciences v. Stanford University*, 489 U.S. 468, 473, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989), quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213,219-20, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985). In essence, the FAA places agreements to arbitrate on the same footing as other contracts in federal courts. *Volt, supra*, quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S. Ct. 2449, 41 L. Ed. 2d 270 (1974). The FAA does not create a set of rules for conducting arbitrations or a body of arbitrators for doing so; rather, it makes contracts providing for reference to arbitration fully enforceable. Although it does not completely pre-empt the field of arbitration, it constitutes substantive federal law which, by virtue of the Supremacy Clause, is as applicable in state as in federal courts. *Southland Corp. v. Keating*, 465 U. S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984).

Because of the strong federal policy in favor of arbitration, the scope of judicial review under the FAA is very narrow. *Federated Dept. Stores v. J.V.B. Industries*, 894 F. 2d 862, 866 (6th Cir. 1990), citing *Dobbs, Inc. v. Local No. 614, International Brotherhood of Teamsters*, 813 F. 2d 85 (6th Cir. 1987). In that respect, the Supreme Court has held:

BEST AVAILA

> [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overcome his decision.

United Paperworkers International Union v. Misco, ... U.S. 29, 108 S. Ct. 364, 373, 98 L. Ed. 2d ... Arbitrator error in interpreting the contract or even in applying the law does not warrant a vacation of the award. *Federated Dept. Stores, supra, citing Anaconda Co. v. District Lodge No. 27 of the International Association of Machinists and Aerospace Workers*, 693 F. 2d 35, 38 (6th Cir. 1982). Federal courts are not authorized to reconsider the merits of an award even though the parties allege the award rests on errors of fact or misinterpretations of the contract. *Board of County Commissioners of Lawrence County, Ohio v. L. Robert Kimball and Associates*, 860 F. 2d 683 (6th Cir. 1988), citing *Misco*, 108 S. Ct. at 370. The sole grounds for vacation of an award are those set forth in 9 U.S.C. §10 and the additional ground that the arbitrator's decision is in "manifest disregard of the law," an authorization which is also narrowly construed. *Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953); *Annotation, Vacation of Arbitration Award*, 20 ALR Fed 295 (1974).

Applying the foregoing law, the Court arrives at the following conclusions:

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THE COMPENSATORY AWARD OF $10,710.95 TO NCR MUST BE CONFIRMED

Neither party contests the propriety of this Award (Ex. BB to Doc. #2). NCR offered to forego confirmation in the event that both of the other Awards were vacated. In light of the Court's action on the other Awards, there is no occasion to accept that offer.

THE COMPENSATORY AWARD OF $58,896.00 TO ACME MUST ALSO BE CONFIRMED

1. The Arbitrator's Refusal to Apply a Statute of Limitation Was Not in Manifest Disregard of the Law.

NCR argues strongly that Arbitrator Ganz's refusal to apply any statute of limitations, and particularly New York's, to Acme's unfair competition claims was in manifest disregard of the law. The Court disagrees.

Before the Arbitrator, NCR established that any cause of action Acme had for unfair competition had accrued by and was known to Acme by 1984. Thus NCR was able to make a forceful argument that those claims were barred by a number of potentially applicable provisions of the New York Civil Practice statute (See Doc. #2, Ex. M). However, the effect of a statute of limitations is to bar an action at law, not arbitration. See *Annotation, Statute of Limitations as Bar to Arbitration under Agreement*, 94 ALR 3d 533, §2 (1979). Had these claims remained pending in the New York Supreme Court, NCR would have had an excellent motion to dismiss

the counterclaims as barred by the statute. It chose instead to demand the claims be arbitrated.

States may have specific statutes of limitations barring actions to compel arbitration after a certain time or general limitations on contractual actions may have the same effect. That is not, however, the issue here: there is no claim that NCR's demand for arbitration was untimely.

NCR attempts to distinguish, both here and before the arbitrator, between the timeliness of, a demand for arbitration and the timeliness of the underlying claims (See Ex. P to Doc. #2). That is a valid distinction, but it is not helpful to NCR. If the statutes of limitations on which NCR relies were of the sort that purport to extinguish claims, rather than limit actions in court, they might be relevant, but they do not purport to be statutes of that sort. Rather, on their face they limit the bringing of actions.

The case authority relied upon by NCR is not to the contrary. In *Reconstruction Finance Corn. v. Harrisons & Crosfield, Ltd.*, 204 F. 2d 366 (2d Cir. 1953), the question was the timeliness of the action to compel arbitration. In *Miller v. Prudential Bache Securities, Inc.*, 884 F. 2d 128 (4th Cir. 1989), the arbitrators had applied the Maryland statute of limitations under the New York borrowing statute; the plaintiff asserted this was an error of law, but the Fourth Circuit, consistently with principles cited above, held that the question of which statute of limitations, if any, to apply was for the arbitrators to decide and their award would not be set aside for mere mistake of law. *In Son Shipping Co. v. Defosse &*

Tanghe, 199 F. 2d 687 (2d Cir. 1952), relied upon by the Arbitrator, the Second Circuit specifically held a statute of limitations on an underlying claim did not apply when the claim was to be arbitrated. In *Office of Supply, Government of the Republic of Korea v. New York Navigation Co., Inc.*, 469 F. 2d 377 (2d Cir. 1972), it was held not to be a manifest disregard of the law for an arbitrator to honor a limitations clause from a statute incorporated by reference into the contract between the parties. There is no doubt that NCR and Acme could have lawfully incorporated into the 1982 Agreement either an express limitation on claims or incorporated a statute of limitations by reference, but they did not do so.

Thus the Court concludes that the Arbitrator was correct in holding that the statute of limitations is not directly applicable in arbitration and in not applying a statute here, but rather finding that the right to obtain arbitration had to be exercised within a reasonable time. And of course, even if the Arbitrator had been wrong, this Court would have no authority to review the merits of his decision on this issue.

2. NCR's Other Asserted Grounds for Vacating the Compensatory Award Are Not Persuasive.

NCR also argues that the award of compensatory damages was fundamentally unfair because the Arbitrator's calculation of Acme's lost profits was based on a theory which he announced after the close of the evidence, so that NCR was not given an opportunity to be heard.

In support of this claim, NCR relies on cases which have vacated arbitral awards because a party was not given notice of claims against it or was denied the opportunity to present evidence. That is not the situation presented here. Rather, NCR knew all along that Acme sought lost profits. Acme apparently proceeded upon one method of proving such profits (loss of specific customers) for some time and then abandoned that theory in favor of a projection from profits it was making. The Arbitrator announced he was dissatisfied with that theory and inquired about sales actually made by NCR. He then based his calculation of damages on what he calculated those sales to have been.

NCR asserts that it has good evidence that the Arbitrator seriously overestimated those damages, and it presents to this Court evidence it would have presented had it been given an opportunity. It admits, however, that it never sought an opportunity to present that evidence; it merely gathered the evidence and waited for the Arbitrator to call. This is not the same as being denied the chance to proffer evidence which it asked to present. Moreover, NCR admits that the total compensatory award made by the Arbitrator is much closer to the range suggested by NCR's evidence than to anything Acme presented.

Under these circumstances, the Court finds NCR's argument an attempt to have this Court review the merits of the compensatory award. As the authority cited above makes clear, the Court lacks the power to do 50, no matter how convincing a case NCR might make with the new evidence. NCR contracted for arbitration, not judicial process.

Decision and Order of the District Court
November 16, 1993

THE PUNITIVE DAMAGES AWARD MUST BE VACATED

In his Third Award, Arbitrator Ganz made "a punitive damage award in the sum of $1,335,180.00 ... against NCR Corporation" and in favor of all entities or persons who were non-servicing NCR dealers as of May 25, 1984. The parties agree that the portion of this award in favor of non-parties to the arbitration, to wit, all the non-servicing NCR dealers, is in excess of the Arbitrator's powers and must be vacated. Acme seeks to retain the entire award for itself, but the Court concludes that the entire award must be vacated, although not all of the reasons for doing so argued by NCR are sound.

1. The Arbitrator Had the Power to Make a Punitive Damages Award.

NCR argues that because the substantive law of New York is applicable to this arbitration and New York prohibits arbitrators from awarding punitive damages, Arbitrator Ganz had no power to do so. Acme counters that the New York rule in question, announced in *Garrity v. Lyle Stuart, Inc.*, 40 N.Y. 2d 354, 353 N.E. 2d 793, 386 N.Y.S. 2d 831 (1976), is not applicable to arbitration proceedings under the FAA and is against the great weight of authority in other jurisdictions.

The parties' positions sidestep a crucial point: it is not the FAA which confers powers on arbitrators, but the contract between the parties submitting an issue to arbitration. In this case, the parties did not expressly grant or deny the arbitrator power with respect to punitive damages, but they did

expressly incorporate into the 1982 Agreement the provision that any arbitration would be under the Rules of the American Arbitration Association. Rule 43 of those Rules provides in pertinent part:

> The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.

The arbitrator's powers thus turn on an interpretation of this incorporated Rule, not on an interpretation of the FAA.

In interpreting Rule 43, numerous courts have held that it is broad enough to authorize arbitrators to award punitive damages. See *Raytheon Co. v. Automated Business Systems, Inc.*, 882 F. 2d 6(1st Cir. 1989); *Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F. 2d 1056 (9th Cir. 1991); *Bonar v. Dean Witter Reynolds, Inc.*, 835 F. 2d 1378 (11th Cir. 1988). While the Sixth Circuit has not discussed a possible award of punitive damages under this Rule, it has found the Rule broad enough to authorize an arbitrator to enter a preliminary injunction, a function ordinarily reserved to judges while lay juries are permitted to award punitive damages. *Island Creek Coal Sales v. Gainesville*, 729 F. 2d 1046 (6th Cir. 1984).

These cases must be distinguished from those relied on by NCR which invalidate awards of punitive damages. Those cases have either proceeded under a specific choice of law

clause which made New York law, and therefore the *Garrity* rule, applicable, or they have been under the narrower arbitration rules of the New York Stock Exchange or the National Association of Securities Dealers. *See, e.g., Barbier v. Shearson Lehman Hutton, Inc.*, 948 F. 2d 117 (2d Cir. 1991)(specific New York choice of law clause, NYSE rules); *Thomson McKinnon Securities, Inc., v. Cucchiella*, 32 Mass. App. Ct. 698, 594 N.E. 2d 870 (1992)(same).

Arbitrator Ganz's power to award punitive damages here must be upheld on an additional basis, one not argued by the parties. It is well established that a party who successfully asserts a position in litigation is then judicially estopped from asserting a contradictory position in the same or subsequent litigation between the same parties. 31 C.J.S. Estoppel, §§118, 119. Here NCR successfully asserted to the New York Supreme Court that Acme's unfair competition claims, including the claims for punitive damages, were arbitrable under the 1982 Agreement. The New York Supreme Court agreed with that position and stayed Acme's action pending submission of the claims to arbitration (See Decision of Justice Fischer, Ex. D. to Doc. #2). Having asserted that the punitive damages claims were arbitrable, NCR cannot now be heard to deny it.

2. The Arbitrator Exceeded His Powers in Awarding Punitive Damages to Non-Parties.

This point is conceded by the parties and supported by law cited by NCR.

3. The Punitive Damages Award Must Be Vacated Rather than Modified.

Acme argues that the Court should modify the Third Award to make the punitive damages payable only to it. It notes that the purpose of punitive damages in general is to punish misconduct and the Arbitrator clearly decided that NCR's conduct with respect to its non-servicing dealers merited punishment. Since the Arbitrator had the power to award punitive damages, Acme says, that power should be vindicated by modifying the Third Award to make the punitive damages payable to Acme.

NCR responds that its conduct, as found by the Arbitrator, was not sufficient to warrant punitive damages under the applicable New York standards, but the Court declines to engage in this analysis, which would amount to a review of the merits of the arbitral award.

A federal district court's power to modify an award under 9 U.S.C. §11(c) is extremely limited, available only when the award "is imperfect in matter of form not affecting the merits of the controversy" and then only to "effect the intent thereof and promote justice between the parties." 9 U.S.C. §11; *Island Creek Coal Sales*, 764 F. 2d at 440. In this case, vacating that portion of the Third Award which allows punitive damages to non-parties would both affect the merits, and not effect the intent of Arbitrator Ganz. As to the merits, such action by the Court would shift over $ 1.3 million from the non-parties to Acme. Arbitrator Ganz specifically noted his intention not to award all of the punitive damages to

Acme, so the modification would result in what he himself called a "windfall" to Acme. While Arbitrator Ganz included very general severability language in his Decision, he did not in any way indicate that language was intended to permit redirecting the punitive damages award as Acme requests.

The Court likewise declines the suggestion to confirm that portion' of the punitive damages award which would represent Acme's pro rata share of the punitive damages. There is no evidence before the Court of how many non-servicing dealers NCR had in May, 1984, nor would taking such evidence be consistent with the very limited role of federal courts in reviewing arbitral awards.

CONCLUSION

In accordance with the foregoing decision, the Clerk shall enter judgment as follows:

1. In favor of NCR and against Acme, CONFIRMING the award of $10,710.95;

2. In favor of Acme and against NCR, CONFIRMING the award of $58,896.00 plus all arbitration administrative expenses and arbitrator's compensation and expenses; and

3. In favor of NCR and against Acme, VACATING the award of punitive damages.

Netting the first two awards, the Clerk shall enter a money judgment in favor of Acme and against NCR in the amount of $48,185.05. In addition, NCR is hereby ORDERED to reimburse Acme for any portion of the arbitration expenses prepaid by Acme.

November 16, 1993.

/s/ Michael R. Merz
Michael R. Merz
UNITED STATES MAGISTRATE JUDGE

Judgment of the District Court, November 17, 1993.

Filed: November 17, 1993

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

NCR CORPORATION,

Petitioner,

vs

Case No: C-3-91-027

CBS LIQUOR CONTROL, INC.,
dba ACME CASH REGISTER CO.,

Respondent.

SAC-CO., INC.,
dba ACME CASH REGISTER CO.,

Applicant/Movant, Case No: C-3-91-031

vs

NCR CORPORATION,
JUDGMENT IN A CIVIL CASE

Respondent.

X **Decision by Court**. This action came to trial or bearing before the Court. The issues have been tried or beard and a decision has been rendered.

Judgment of the District Court, November 17, 1993.

IT IS ORDERED AND ADJUDGED that Judgment is ENTERED IN FAVOR of NCR Corporation and AGAINST Acme Cash Register Co., confirming the award in the amount of $10,710.95;

that Judgment is ENTERED IN FAVOR of Acme Cash Register Co. and AGAINST NCR Corporation, confirming the award of $58,896.00 plus all arbitration administrative expenses and arbitrator's compensation and expenses;

that Judgment is ENTERED IN FAVOR of NCR Corporation and against Acme Cash Register Co., vacating the award of punitive damages;

and that judgment is entered in favor of Acme Cash Register Co. and against NCR in netting of the first two awards in the amount of $48,185.05;

and that NCR Corporation shall reimburse Acme Cash Register Co. for any portion of the arbitration expenses prepaid by Acme.

November 17, 1993 Kenneth J Murphy, Clerk

/s/ Carla S. Evans
(By) Deputy Clerk

Decision and Order of the District Court
on rehearing, December 24, 1993

Filed: December 27, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

NCR CORPORATION,

Petitioner, Case No. C-3-91-027

- vs -

Magistrate Judge Michael
R. Merz

CBS LIQUOR CONTROL, INC.,
dba ACME CASH REGISTER CO.,

Respondent. :

SAC-CO, INC.,
dba ACME CASH REGISTER CO.,

Applicant/Movant, Case No. C-3-91-031

- vs -

Magistrate Judge Michael
R. Merz

NCR CORPORATION,

Respondent. :

Decision and Order of the District Court
on rehearing, December 24, 1993

DECISION AND ORDER GRANTING ACME'S MOTION FOR RECONSIDERATION AND MODIFYING IN PART THE COURT'S DECISION AND ORDER CONFIRMING IN PART AND VACATING IN PART ARBITRATION AWARDS

This case is before the Court upon Motion (Doc. #30) of Sac-co, Inc., doing business as Acme Cash Register ("Acme") to alter or amend the judgment entered in this case on November 17, 1993 (Doc. #29). Acme brings the Motion pursuant to Fed. R. Civ. P. 59(e) or, alternatively, pursuant to Fed. R. Civ. P. 60.

NCR Corporation ("NCR") objects that, to a very substantial degree, Acme's Motion merely seeks reconsideration of Court's Decision and Order Confirming in Part and Vacating in Part Arbitration Awards (Doc. #28) and that a motion under Rule 59(e) is not an appropriate vehicle for such reconsideration which should instead take place in the Court of Appeals.

The Court disagrees with NCR's position. So long as a motion to amend is brought within the ten-day limit for such motions and not made with the purpose of delay, there is no good ground to forbid a trial court to correct its errors, if it has made errors, before the matter is presented to the Court of Appeals. An appeal is a costly proceeding for both the parties and the judicial system. If a trial judge can be persuaded that she or he has made a mistake, both the parties

and the system are saved that cost. Indeed, a District Judge of this Court has recently confirmed that a motion under Rule 59(e) is usually denominated and properly treated as a motion for reconsideration. *Shivers v Grubbs*, 747 F. Supp. 434, 436 (S.D. Ohio 1990)(Smith, J.) See also Wright & Miller, FEDERAL PRACTICE AND PROCEDURE: CIVIL §2817. Accordingly, Acme's Motion to Alter or Amend, construed in part as a motion for reconsideration, is GRANTED.

However, upon reconsideration, the Court is not persuaded that it erred in vacating the Arbitrator's award of punitive damages. Indeed, because Acme's argument on this part of its Motion is largely a restatement of arguments it made prior to judgment, little additional analysis is needed. As previously held, the Arbitrator exceeded his powers in fashioning an award of punitive damages to a class of NCR dealers, all but one of whom were non-parties. For this Court to "sever" that part of the award which made non-parties beneficiaries of the award would be so gross a modification of the substance of the award as to be an inappropriate judicial review of the substance of an arbitration award.

As an alternative, Acme seeks in its Motion a remand to the Arbitrator to clarify his intent as to what should happen if the non-party beneficiaries are separated from the award. In rejecting this alternative, the Court is persuaded by two considerations raised by NCR in opposition.

First of all, Acme did not seek remand as an alternative remedy prior to judgment. While a motion to

amend under Rule 59(e) is an appropriate vehicle for a court to reconsider errors it made in directing judgment, it is not an appropriate vehicle for a party to seek a new, alternative, mode of relief.

Secondly, while remand to an arbitrator is appropriate when an award is ambiguous, see *Olympia & York Florida Equity Corp. v. Gould*, 776 F. 2d 42 (2d Cir. 1985), that is not the case here. The Arbitrator's award is crystal clear: $1.3 million in punitive damages are awarded to a class of NCR dealers. Moreover, both parties are agreed that this very clear award is ultra vires. The remand requested by Acme would essentially be to ask the Arbitrator to make a new award, now that his ultra vires award has been vacated. That result is not required under the Federal Arbitration Act.

In accordance with the foregoing, the Court declines to modify that portion of the judgment vacating the Arbitrator's punitive damages award.

In the second branch of its Motion, Acme seeks amendment of the judgment to liquidate the Court's award of arbitration expenses in the amount of $6,287.12. NCR agrees this is proper and the judgment will be amended accordingly.

In the third branch of its Motion, Acme seeks an award of post-award, prejudgment interest at the Ohio pre-judgment rate of 10%. NCR agrees Acme is entitled to such an award, but argues it should be at the New York

pre-judgment rate of 9%. The arbitration clause pursuant to which this matter was referred to arbitration and pursuant to which the venue of this lawsuit is in this Court provides that any arbitration award made under the agreement should be deemed to have been made in Dayton, Ohio. In the Court's judgment, this makes the Ohio rate more appropriate.

The Clerk is hereby directed to enter an amended judgment as follows:

1. In favor of NCR and against Acme, confirming the compensatory award to NCR in the amount of $10,710.95;

2. In favor of Acme and against NCR, confirming the compensatory award to Acme in the amount of $58,896;

3. In favor of Acme and against NCR, confirming the award to Acme of its arbitration expenses in the amount of $6,287.12;

4. In favor of Acme and against NCR in the netted amount of $71,545.09, consisting of $54,472.17 plus interest at 10% per annum from November 8, 1990, to December 27, 1993, to wit, $17,072.92, plus interest after judgment at the rate prescribed by law;

5. In favor of NCR and against Acme, vacating the award of punitive damages.

December 24, 1993.

/s/ Michael R. Merz
Michael R. Merz
UNITED STATES MAGISTRATE
JUDGE

Amended Judgment of the District Court
December 27, 1993

Filed: December 27, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

NCR CORPORATION

AMENDED JUDGMENT
IN A CIVIL CASE

v.

CBS LIQUOR CONTROL, INC., dba
ACME CASH REGISTER CO.,

Case Number: C-3-91-27

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

X **Decision by Court**. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED Judgment in favor of NCR and against Acme, confirming the compensatory award

to NCR in the amount of $10,710.95; In favor of Acme and against NCR, confirming the compensatory award to Acme in the amount of $58,896; in favor of Acme and against NCR, confirming the award to Acme of its arbitration expenses in the amount of $6,287.12; In favor of Acme and against NCR in the netted amount of $71,545.09, consisting of $54,472.17 plus interest at 10% per annum from 11/8/90, to 12/27/93 to wit $17,072.92 plus interest after judgment at the rate prescribed by law; In favor of NCR and against Acme, vacating the award of punitive damages.

December 27.1993
Date

Kenneth J. Murphy
Clerk

/s/ M. Stone
(By) Deputy Clerk

Arbitrator's Decision, November 8, 1990

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration
Between

NCR CORPORATION

and

CBS LIQUOR CONTROL, INC.
d/b/a ACME CASH REGISTER COMPANY

Case No. 15 199 0221 89MJC

DECISION

INTRODUCTION

This is a case in which an enormous amount of testimony and documents was heard and produced, but the ultimate issue to be resolved is relatively simple. The issue is whether or not NCR, in structuring their relationship with non-servicing dealers of its products during the period 1982-1988, fairly did engage in competition with such dealers.

PRELIMINARY ISSUES

At the outset, the structure of this case must be set forth and the stipulation with respect to a portion of the claim be set forth. The case in arbitration was commenced by NCR as a claimant. NCR claims the sum of $14,556.90 under a Payment Deferral Agreement relating to unpaid invoices for machines furnished to CBS Liquor Control, Inc. d/b/a Acme Cash Register Company (hereinafter "Acme"). The amount due under the Payment Deferral Agreement has been stipulated in the aforesaid amount. However, Acme reserved the right to contest whether or not the entire transaction was enforceable. Acme counterclaims in this arbitration for $4,673,300.00 relating to tortious interference with contractual relations, misappropriation of customers, disparishment, unfair competition, breach of the duties of good faith and fidelity, breach of contract, fraud and loss of investment expense.

NCR raised a variety of Statute of Limitations-related matters in defense to the aforesaid claims. Those issues were determined in Acme's favor by Decisions dated September 10,

1990 and September 26, 1990. The substance of those Decisions will not be repeated here.

THE HEARINGS

The hearings were held primarily in Binghamton, New York and were held over twelve hearing days. During that time, 42 witnesses were heard (five by telephone pursuant to the stipulations of the parties). 350 exhibits were introduced by Acme and 80 exhibits were introduced by NCR. While the majority of the witnesses and documents focused on issues relating to specific customers, their complaints, purchases and later sales by NCR; also produced at the hearing were documents and witnesses that gave insight into the structural relationship between NCR and its dealers during the relevant time period.

NCR has argued that the pleading in which Acme asserts its claims (the "Answer and Counterclaims" initially put forth in the Broome County Supreme Court Action but considered as the arbitration answering statement pursuant to the letter of February 14, 1990 of Acme's counsel) does not adequately assert the "structural" claim of unfair competition which the undersigned as Arbitrator has repeatedly stated is, in the Arbitrator's view, the appropriate issue to be addressed. It is my view that the allegations of several paragraphs, taken together constitute a sufficient basis for the matter to be considered and decided on this basis. See paragraph 23 of that pleading which generally assert that NCR made approaches to customers under the guise of servicing the equipment which then resulted in sales; paragraphs 35-39 which generally allege a relationship between dealer and

manufacturer as a relationship of dependency and confidence which NCR abused by deliberately misappropriating business opportunities, etc; paragraph 31 which repeats the same factual basis and alleges a breach of the duty of good faith and fair dealing implied in every contract; paragraph 34 which, based on the same factual predicate asserts that the 1982 dealer contract was entered into with an intent to deliberately usurp the business relationship Acme would develop with its customers and it failed to advise Acme of its intention.

Further, the Arbitrator repeatedly advised NCR of the intention to treat this case in this manner and NCR responded to that notice by introducing appropriate evidence to justify its "structural" arrangement. There is, therefore, no prejudice or surprise in the matter being considered in this vein.

FACTUAL BASIS

As indicated in the introduction to this Decision, despite the fact that the majority of the evidence presented related to specific customer situations, I have decided not to base my Decision on that factual context. The evidence does not meet Acme's burden of demonstrating wrongful conduct by NCR with respect to the specific customers. For every claim of wrongdoing that was presented, NCR presented numerous facts negating any wrongful conduct. There was simply not a sufficient level of probative and credible evidence upon which an Arbitrator could rationally decide that NCR had wronged Acme with respect to any specific transaction.

Further, the proof with respect to Acme's overall conduct in the operation of its business is not sufficient to

allow it to recover on these specific basis. NCR demonstrated that Acme had been terminated by numerous other dealers; that Acme had been sued repeatedly by customers that Acme had engaged in overselling and non-delivery of promised products; had made misrepresentations in the form of airing television commercials claiming an authorized NCR dealership after it had been terminated; that much of Acme's staff was untrained in the areas that it had to work in (Debbie Sacco, the programmer, had never gone to the type of NCR schools that would be required to do the programming she engaged in, John Ellingson, the technician, did not go to any NCR training schools for the machines he worked on). This proof destroyed any claim that Acme was, in fact, ready, willing and able to service the specific customers that it claimed would have purchased but for NCR's wrongful conduct.

On the other side of the ledger, NCR's conduct in the establishment of its dealer program, while not malicious, is far from exemplary. In 1982, after 100 years of relying solely on direct sales, NCR commenced a dealer program. For the northeast region, it assigned Nick Rocco to recruit dealers. Mr. Rocco testified that he did not discuss the fact with dealer recruits, that in the past, field engineers (hereinafter "FEs") had been permitted to sell various products in areas where NCR's direct sales force could not adequately service the customer base. (Exhibits 323, 324). It was these same areas where it was no longer efficient to have a direct sales force that Mr. Rocco attempted to set up dealers. Mr. Rocco and NCR Corporation encouraged dealers to be non-servicing dealers and thereby generate servicing revenue for NCR by having maintenance contracts solicited by the selling dealer to be taken out directly with NCR. This of course, put the FEs

right in the offices of the customers which were searched out and sold by the dealers.

In order to help with the recruitment of dealers and to "build trust and confidence in the dealer program", according to James J. McCarthy, the Vice President of the entire national Retail Sales Organization of NCR, a memo was sent to field engineering through their separate organizational channels that they should not sell products that dealers could sell in areas where dealers were appointed. (Exhibit 325). This was communicated by persons such as Mr. Rocco to dealers and dealer recruits.

However, less than two years later, when there were between 100 to 150 dealers nationwide (See, Exhibit 38) corporate management in Dayton determined that there had been an insufficient number of units sold of low end ECRs (electric cash registers) and therefore, instructed in a memo (Exhibit 328) FEs to resume selling not only low end ECRs but also the flag-ship product of the time, the model 2126 which was particularly suited to grocery stores and could be added onto to make a scanning system. After this 1984 memo, FEs were encouraged to sell even more than in the period prior to 1982 because they were given "prize points" which would enable them to receive additional compensation in the form of products from a catalog. Further, their selling was put into their job evaluations and sales goals of $1,000.00 per man per month were established throughout the country for FEs to sell either products or supplies.

Certain documents (Exhibit 235) indicate that revenue from sales by FER "desperately needed". The implication is

that, absent a certain level of sales within the FE departments, their level of staffing was jeopardized. However, Mr. McCarthy denies that such sales goals were rigorously enforced.

Acme's expert witness, Holbrook, who holds an MBA from Harvard in marketing and has extensive experience in strategic planning and marketing indicated in his testimony, which was unrebutted, that having both a dealer network and a direct sales force (FEs selling is a form of "direct sales force") in the same area is counterproductive, unusual and harmful to the dealer. He reasoned that such a situation creates customer confusion, turns allies into competitors and erodes the dealer's customer base.

Further, when Acme complained about this structural inequity (albeit in the form of specific customer situations) in repeated writings (Exhibits 51, 101, 120), NCR Corporation never responded to Acme in writing in any way addressing the fundamental problem that it had created. Mr. Holbrook, joined by NCR's Vice President McCarthy, agreed that the failure to make such a written response and to address the problem directly to Acme was inappropriate.

Mr. Rocco felt that the decision to allow FEs to sell was a bad business decision. But according to Mr. McCarthy, while there was some generalized discussion of what effect it might have on dealers, there was a feeling that the "larger picture" of NCR's competitive position in the ECR field justified this decision. There was no attempt to quantify the economic effect of this 1984 decision on the existing dealers. Mr. McCarthy further indicated that there was no thought

even given to "grandfathering" existing dealers against this field engineering competition.

Mr. McCarthy was equivocal when asked whether or not at all times the NCR Corporation intended to allow the FEs to sell as they had previous to 1982. In evaluating his credibility, I believe that his initial testimony that it was NCR Corporation's intent that, at some point in time, all channels of distribution of ECR products including direct sales, FEs and dealers would be utilized simultaneously is the most credible testimony relating to this issue. His later testimony that NCR did not know in 1982 that it would later allow FEs to sell again is less credible. I therefore, conclude that NCR at the time they recruited the dealers knew that, at some point in time, it would have its own field engineering staff in direct competition with the dealers.

DISCUSSION OF LEGAL ISSUES

Choice of Law

The contract between NCR and Acme (Exhibit 5) does not contain a choice of law provision. While the arbitration clause provides that the decision of the arbitrator is to "be deemed to be made at Dayton, Ohio" that that is not a choice of law provision.

As stated in my two previous decisions with respect to Statute of Limitations issues, if either of the parties had wished to be specific with respect to choice of law, they were free to negotiate such a provision. They failed to do so. Therefore, it

is the Arbitrator's intent to apply general common law principles to the various legal issues involved in this case.

While the following discussion will draw law from various jurisdictions, there may tend to be a predominance of New York Law cited. This only reflects the Arbitrator's greater familiarity with New York cases and should not be intended to reflect that the Arbitrator believes that the specific elements of a cause of action required under New York substantive Law to be binding upon him.

THE UNFAIR COMPETITION/DUTY OF GOOD FAITH CLAIM

As set forth in a previous section of this Decision, the Arbitrator views the issue to be decided here whether or not NCR, by its conduct, unfairly competed with its dealers by changing the structure of the relationship between the dealers and NCR specifically with respect to allowing FEs to sell products to customers within the areas granted to dealers as their principal areas of business.

We must start with an examination of the relationship between NCR and Acme as its dealer. In A.S. Rampell. Inc. v. Hyster Co., 3 N.Y.2d 369 (1957), the Court of Appeals indicated that

> "we are not dealing with competition between economic equals, but with the destruction of a relationship between the manufacturer and the distributor, which is recognized to be that of dependency of the latter upon the former."

In determining whether or not what transpired in this case, constitutes unfair competition, we must understand that unfair competition is an elastic concept which cannot be limited to specific facts. See, Electrolux Corp. v. Val-Worth, Inc., 6 N.Y.2d 556, 568 (1959).

While the concept of unfair competition grew out of the area of trademark/tradename infringement, it has been expanded to include "misappropriation of what equitably belongs to a competitor". 60 N.Y. Jur. - Trademarks, § 65; Madison Square Garden Corp. v. Universal Pictures Co., 255 App. Div. 459 (1938); Goldstein v. Garlick, 65 M.2d 538, 541 (1971).

Applying the above legal principles to the facts at bar, I find that NCR has engaged in unfair competition. Its solicited dealers to represent them by stating that FEs would not sell in their territories, it encouraged them to be non-servicing dealers by which the dealers would turn over revenue to NCR in the form of maintenance agreements which the dealers would otherwise obtain if they were servicing dealers. Then less than two years later, NCR changed its corporate philosophy, allowed FEs to sell not only the low end ECRs, but also the flagship product, the model 2126, and provided that FEs should not sell in areas where there was a NCR direct sales force. This, in essence, forced the FEs to find whatever sales they could in dealer territories. It appears, from what the Arbitrator believes is the more credible testimony given by Mr. McCarthy, that NCR, even at the time it recruited the dealers, knew that they would eventually

"unleash" its field engineering force in competition with the dealers.

This action seems to me to be a violation of the duty of good faith implicit in the dealer contract. In Patterson v. Meyerhofer, 204 N.Y. 96, 100 (1912), the Court states that

> "in the case of every contract, there is an implied undertaking on the part of each party that he will not intentionally and purposely do anything to prevent the other party from carrying out the agreement on his part."

This 1984 corporate decision, it seems to me, was a conscious decision to perform acts which would "have the effect of destroying or injuring the right of the other party to receive the fruits of the contract". Kirke NewLa Shelle Co. v. Paul Armstrong Co., 263 N.Y. 79, 85 (1933).

It is therefore, the Arbitrator's conclusion that the actions of NCR constitute unfair competition and breach of the duty of good faith and fair dealing.

Contractual Limitations

The question then becomes whether or not, even if otherwise actionable, the agreement of the parties precludes Acme recovering for the unfair competition/breach of implied duty of good faith discussed above. Paragraph 13 of the contract is entitled "Limitations". It provides as follows:

> "NCR shall not be liable for any expense or damage incurred by dealer or its customer, whether internal to dealer or its customer or paid by dealer or its customer to any third party, which may arise out of failure of any product to function or due to any malfunction of equipment or program upon whatever cause of action and claim is based except that NCR shall be liable for only, and dealer shall indemnify and hold harmless NCR against any claim by its customer and anyone claiming under the customer for a liability except, bodily injury occasioned solely by the negligence or the willful act of NCR in design, manufacture, installation or servicing of the product. In no event, will NCR be liable for (i) special, indirect or consequential damages; or (ii) any damages whatsoever resulted from loss of use, data or profits arising out of or in connection with this contract, or the use or performance of NCR products whether in an action of contract or tort including negligence. IT IS ACKNOWLEDGED THAT THESE LIMITATIONS PERMIT NCR TO PROVIDE THE EQUIPMENT, PROGRAMS AND SERVICES AT LOWER PATES THAN IT OTHERWISE COULD AND SUCH LIMITATIONS ON LIABILITY ARE REASONABLE."

It should be noted that generally, contractual limitations on liability are strictly construed against the person seeking such

exculpation. See, 22 N.Y. Jur.2d - Contracts, § 267. The Arbitrator reads the aforesaid limitation to be aimed primarily at the circumstance where an individual cash register malfunctions, and there is a claim made by a third party against both the dealer/seller (Acme) and the manufacturer (NCR). See, Grobet File v. RTC Systems, Inc., 524 N.E.2d 404 (Mass App. Ct., 1988). In Grobet, an arbitrator's award was affirmed which refused to enforce a contractual limitation against consequential damages because the arbitrator believed the clause was not intended to cover the subject matter of the dispute. The court held that since the limiting language "may relate" only to one aspect of the transaction and since ambiguities "tilt against the author" (NCR here), it was within the arbitrator's authority to construe the agreement, and it was proper for him to construe the clause as not barring consequential damages. See also, Hawaiian Telephone Co. v. Microform Data Systems. Inc., 829 F.2d 919 (9th Cir. 1987); 6 Comp. L. Rptr., 446, 449 (1987).

In discussions had between counsel and the Arbitrator over this issue during the hearings, NCR pointed out that in the next to the last sentence of the above quoted paragraph the phrase "in connection with this contract or the use or performance of NCR products ..." demonstrates that the intention of the limitation was broader than simply the use of the products by the end user and really did apply to dealer vs. manufacturer issues. I do not believe that NCR's argument is persuasive in this regard. The "or" in the above quoted portion of the paragraph and the phrase "in connection with this contract" could similarly apply simply to the fact that a potential lawsuit by the dealer against NCR for indemnity could be brought "in connection with this contract" or could

be ex contractu. There is nothing in the structure or the wording used in paragraph 13 which demonstrate a clear intention for the clause to be broader than the introductory portions of the paragraph which deal with "any malfunction of equipment or programs upon whatever cause of action any claim is based".

Even if the clause were construed to apply to this type of claim, I would rule that when intentional wrongdoing is involved, there should be no enforcement of such a limitation. See, American Electrical Power Corp. v. Westinghouse Electric Corp., 418 F.Supp. 435, 454 (S.D.N.Y. 1976). Further, if a default is of such a substantial nature as to deprive a party of the fruit of the contract, then consequential damage limitations will not be applied. See, RRX Industries v. Lab-Con. Inc., 772 F.2d 543 (9th Cir. 1985) at page 547. I consider the breach of NCR's duty toward Acme and its other dealers in making this change in structure of the methods of distribution to be of such a substantial nature as to deprive the dealers of the fruits of the dealership arrangement, and thus require the limitation clause to be voided.

COMPENSATORY DAMAGES

At the outset of the arbitration, I indicated to both parties that I believed that showing consequential damages, if recoverable, would be difficult, and I expected a sufficient quantum of proof of a credible nature before I would award lost profits to Acme in the event I sustained its claims on the merits. Both parties went to great effort to produce competent evidence of Acme's lost profits or the lack thereof.

Accountants, marketing experts, professors of business and professors of marketing all testified.

Despite the analyses performed by all of these professionals, none of them established to the Arbitrator's satisfaction generalized proof of lost damages. I have no doubt that lost net profits were occasioned as result of NCR's decision as a matter of corporate policy to allow field engineering to sell equipment in dealer designated territories. The facts are at variance with the corporate philosophy expressed by Mr. McCarthy that FEs when they uncovered leads in areas that were manned by dealers were to turn over those leads to dealers such as Acme. There is only one instance in which that occurred in the entire history of the Acme/NCR relationship.

The trier of fact should not be permitted to speculate as to what lost profits would have been, however, when it is certain that lost profits would have occurred, then proof to an exactitude is a not necessary and damages may be awarded applying experience and common sense to the facts proved. 36 N.Y. Jur.2d - Damages, § 16; Calamari & Perrillo, Contracts (1970) § 209.

Acme's proof with respect to future growth at 12% per year is not sustainable for several reasons. First, the expert it called did not testify that he believed Acme could grow at 12% per year. This was because he simply did not have sufficient facts to come to that conclusion. Secondly, the business magazine articles which were introduced to support a 12% growth rate were adequately rebutted by NCR's testimony during the presentation of its case. Third and most

importantly, the proof shows that Acme was a financially weak company without the capital base necessary to continue to grow. Further, the competent testimony concerning Acme's performance of its work and substantial customer complaints and customer indications of a refusal to do business with Acme in the future negate a finding that the "follow on" sales that would normally form the base of future growth were likely.

Rather than accepting any of the theories advanced for future damages, the Arbitrator will establish compensatory damages utilizing an entirely different approach. It has been said that "the law does not halt or surrender because the state of facts is novel and the ordinary methods of proving values are not available, but will resort to some practical means that will be just to both parties. Alexander Dept. Stores v. Ohrbachs, Inc., 56 N.Y.S.2d 173, 179 (App. Div. 1945). My approach will focus instead on NCR's assumptions about sales by FEs and the existing proof relating the probable net profits to be deprived from such sales. This is non-customer specific and does not rely on any growth rates whatsoever.

The Binghamton field engineering office had 10 service technicians with $1,000.00 per man/per month goal of sales. Therefore, there was a NCR sales goal of $120,000.00 per year from the Binghamton sales office. However, testimony is undisputed that the Binghamton sales office "never achieved anything close" to its sales goal. I estimate the actual sales performance of the Binghamton field office at 50% of the goal indicates that there is a lost sales opportunity to Acme of $60,000.00 a year from the Binghamton office. If NCR had operated its dealer program in a fair way, as Mr.

McCarthy indicated it should have worked, these sales would have been turned over to Acme. Based on the testimony, it appears that Acme's territory overlapped both the Binghamton and Wilkes Barre field engineering office. Rather than attempt to divide up half of Wilkes Barre's actual performance and half of Binghamton's, I am simply assuming that calculating the lost sales based on the entire Binghamton field engineering office is fair and equitable. The character of both the lower southern tier counties in New York and the northern counties of Pennsylvania is similar and there is no reason to expect sales achievements would be significantly different. This was corroborated by Rick Ford's testimony about the sales efforts' of his FEs out of Wilkes Barre.

There is now the necessity of reducing the figure of lost sales opportunities by reason of field engineering sales to lost net profit which is the appropriate measure of damages. Much testimony was produced that NCR FEs "matched" or even beat the price of Acme and therefore, it is fair to assume that a dollar of lost sales from field engineering goal would be the same dollar of sales if Acme had sold it. The testimony has been that the cost of goods was 60% of the sales price. From that, there must be deducted the cost specifically attributable to those sales. Proof was established (Exhibit 336) from which it can be calculated that, on an average in the years 1983, 1984 and 1985, the variable cost attributed to NCR sales was 7.28% of gross sales.[6] This results in a

---

[6]The calculation was made by reducing the gross sales figure reported in Exhibit 336 by the assumed sales tax of 7%; the reducing the "selling expenses" in that exhibit by that same sales tax expenses. Then a calculation was made of the percent selling expense (variable cost) bore to

calculation of lost net profits in the sum of $19,632.00. This is set forth in computational form as follows:

	$120,000.00	Sales Goal Binghamton Office
Less	60,000.00	(Only 50% achieved by Binghamton FEs)
	60,000.00	Estimated Gross Sales
Less	36,000.00	Cost of Goods (60% of Sales Figure)
	24,000.00	Gross Income
Less	4,368.00	Variable Cost (7.28% of Gross Sales)
	$ 19,632.00	Net Profit

It is my determination that such damages ($19,632.00) on an annual basis should be awarded to Acme for the years 1986, 1987 and 1988 making a total of $58,896.00. I choose to end the damages as of 1988 because of NCR at that point introduced a new dealer program by lawfully terminating the old contract and giving dealers the opportunity to participate in the new program. There appears to be no inconsistency between that program and any understanding dealers had about FE competition. It is also not clear that Acme would have been renewed as a dealer for legitimate fiscal and other competence related reasons.

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gross sales, using the reduced figures. Sales tax was thus eliminated as a factor affecting this percentage.

I have not deducted from the compensatory damages any overhead. The parties argued the issue of overhead as a deduction from lost profits and the Arbitrator is convinced that the majority rule is that while the costs directly attributable to a sale must be deducted from gross sales to reach net profit, indirect or overhead costs may not be so deducted. See, Adams v. Lindblad Travel. Inc., 730 F.2d 89 (2d Cir. 1984); Digital & Analog Design Corp. v. North Supply Co., 540 N.E.2d 1358 (Ohio, 1989).

NCR's claim has been stipulated to as to amount ($14,556.90), as set forth above, Acme reserved the right to assert that the Payment Deferral Agreement is invalid because of NCR's wrongful conduct. The answer and counterclaims assert all of the counterclaims also in the form of affirmative defenses. However, if compensatory damages are awarded to put Acme in the place it would have been but for the change in corporate philosophy, the net profit they would have realized would be reduced by the cost of the machines from NCR. Of the $14,556.90, it appears that $10,710.45 is for unpaid machines and the balance is for service charges.[7] Since no interest is being awarded to Acme for the time it was deprived of such lost profits, only that portion of NCR's claim which is for machines itself is recoverable. Such amount $10,710.95 is to be set forth in a separate award.

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[7]This is an approximate calculation based on the interest rate expressed in the Payment Deferral Agreement (Exhibit 527) and the length of time since its execution.

PUNITIVE DAMAGES

NCR, in its brief, correctly points out that if this arbitration were maintained under state law, the Arbitrator would have no power to award punitive damages. See, Garrity v. Lyle Stewart, Inc., 40 N.Y.2d 354, 353 (1976). However, courts have interpreted the Federal Arbitration Act under which this arbitration is maintained as permitting the imposition of punitive damages in the appropriate case. See, Singer v. Hutton, 699 F.Supp. 276 (1988); Ehrich v. A.G. Edwards & Sons. Inc., 675 F.Supp. 559 (1987); Willoughby Roofing & Supply v. Kagina International Corp., 598 F.Supp. 353 (1984). The rationale for permitting punitive damages to be awarded by arbitrators in the interstate commerce type actions provided for under the Federal Arbitration Act is explicitly spelled out in the above cited cases and will not be repeated in this decision. Punitive damages are appropriate in an unfair competition case. See, Getty Petroleum v. Island Transportation Corp., 878 F.2d 650, 657 (2d Cir. 1989). Punitive damages are especially appropriate in situations where the wrong done is not aimed just at the named Plaintiff but rather is aimed at the public at large. See, Kaufman v. Chase Manhattan, 581 F.Supp. 350, 356 (1984); Wallker v. Sheldon, 10 N.Y. 2d 401 (1961). Here, I find, that the wrong of NCR was not aimed at Acme specifically but was named at all of its non-servicing dealers and is therefore, the type of wrong for which punitive damages may be imposed.

The question then becomes whether or not the Arbitrator would have, pursuant to the arbitration agreement and the agreement of the parties, the power to award punitive damages.

The arbitration provision of the contract specifically makes reference with the rules of the American Arbitration Association. Rule 43 of the American Arbitration Association provides that

> "the arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties."

There is no prohibition within the agreement against the arbitrator awarding punitive damages. For the reasons set forth above, there is no limitation on the scope of damages to be awarded in this type of case under the terms of the agreement between the parties.

It has been stated repeatedly that arbitrators must have "broad authority to do justice and fashion appropriate remedies". See, Cook v. Miskin, 95 A.D.2d 760, 761 (1983); Willoughby Roofing & Supply Co., supra, 598 F.Supp. at 357.

It is my intention in this decision and subsequent award, to fashion a punitive damages award which is unique to my own research but will do justice and utilize arbitration's flexibility to neither be unfair to NCR nor unjustly reward or provide a windfall to Acme. [See, Alexander Dept. Stores. v. Ohrbachs, supra].

Among the various purposes that the award of punitive damages performs is to provide a deterrence function. In this case, deterrence is important because the Arbitrator believes that NCR Corporation, while not acting maliciously in

determining in 1984 to allow FEs to sell in competition with dealers that it had just a recently recruited, does believe that NCR had not evidenced a sufficient sensitivity to the rights of others in making its corporate decisions. By the award of punitive damages in this case, it is hoped to deter NCR from similar conduct in the future in altering corporate policy without due regard to the effect that such changes will have on third parties who have entered into long term relationships with it based on an existing set of corporate policies and a lack of disclosure of the corporation's intention to be able to change those policies at will to the third party's detriment. In an article in the Alabama Law Review (40 Ala. L. Rev. 839, (1989)), Daniel B. Dobs proposes punitive damages which are really "extra compensatory" because they are designed to deter through economic disincentives rather than to punish for evil conduct. It is this concept which is appropriate here. This concept is also supported by Professor Kuter in his article "Punitive Damages for Deterrence. When and How Much." also found at 40 Ala. L. Rev. 1143 (1989).

Applying this concept to the facts at bar, I award punitive damages against Defendant in the amount of $1,335,180.00. That figure is reached by starting with the field engineering sales goal of $1,000.00 per man/per month. This assumes $120,000.00 annual sales goal per field engineering office of 10 FEs. Utilizing a 60% cost of goods and a 7.28% variable cost (as described above), it is my belief that the profit potential that should have been reaped by NCR was $44,506.00 per year per field engineering office. For the years 1986, 1987 and 1988, the lost profits is $133,518.00.

I choose not to reduce this figure by the actual performance of the FEs. As indicated in the articles referred to above, it is the wrongful doer's intended economic benefit for which dis-incentives must be sought. In other words, at the outset of future economic decisions, NCR must realize that whatever their expected profit is, that expected profit will be taken away in the form of punitive damages if it does not act in a proper manner. I have then multiplied the $133,518.00 by a factor of 10. I could have reasonably looked at the documents (Exhibit 38) which would indicate that were between 100 and 150 dealers and multiplied the figure by such a multiplier. However, I feel that to do so would be to unjustly punish NCR. Since not all of the dealers were nonservicing dealers and since it is probable that NCR knew its sales goal was unrealistically high, a multiple of 10 does appear to me to be sufficient to act as a deterrent from future conduct of a similar nature.

It should be specifically noted that the damages which I have labeled punitive, I have awarded against NCR. I have not awarded them in favor of Acme and that is a conscious decision. It is not acceptable, in this Arbitrator's view, to give the Plaintiff a windfall simply in order to accomplish the deterrence role of punitive damages.

While I can find no specific authority for awarding punitive damages in favor of parties not in the litigation, in a recently published treatise, Punitive Damages Law and Practice, there is a substantial discussion about the possibility of over compensating an initial claimant and exposing a wrongdoer to multiple claims for punitive damages for one wrongful act. Also, there is a trend in such awards to

apportion punitive damages among defendants to do justice when there are multiple defendants. See, Punitive Damages, Law and Practice, § 16.09. I see no reason why apportionment cannot be made in reverse and therefore, require an award of punitive damages to be divided between the adversely effected persons, even if they are not before the specific Arbitrator. While this will not bind future triers of fact from making punitive damages awards if they see fit against NCR for the same act, I would think that they would perceive less of a need to do so if such monies are awarded in favor of all of the adversely effected parties.

I therefore, require NCR (over which I have jurisdiction) to distribute the $1,335,180.00 between all United States nonservicing dealers who had such status prior to May 25, 1984, the date NCR announced to dealers that FEs were permitted to sell. This will include Acme. The distribution among such persons or entities shall be on a equal basis. That is, if there were 70 such dealers, the award must be made to each of them in 1/70th of the aforesaid amount. In the event that a dealer cannot be located, is bankrupted or otherwise unable to receive such share, then the amount shall be recalculated and distributed on a pro rata basis to the remaining dealers. NCR shall file with AAA an affidavit of compliance with this award attaching a schedule showing the names and addresses of the dealers and the amounts of such dealer's share of the punitive damage award.

ADMINISTRATIVE EXPENSES AND INTEREST

The Arbitrator hereby awards administrative expenses 100% against NCR based on the findings discussed above. To

the extent, Acme has paid monies to the American Arbitration Association in connection with this arbitration, NCR is to reimburse Acme for such payments. There is to be no pre-award interest paid on any of the aspects of this award. If any part of this decision and awards made thereupon is determined to be void, illegal or beyond my power to make, then the remainder shall be severed and considered valid notwithstanding the impropriety of the part so struck down.

DATED: November 8, 1990

/s/ Robert E. Ganz
ROBERT E. GANZ

Arbitrator's Awards, November 8, 1990

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration
Between

NCR CORPORATION

and

CBS LIQUOR CONTROL, INC.
d/b/a ACME CASH REGISTER COMPANY

Case No. 15 199 0221 89MJC

AWARD OF ARBITRATOR

I, the undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above named parties and dated July 28, 1982, and having been duly sworn and having duly heard the proofs and allegations of the parties award as follows:

Arbitrator's Awards, November 8, 1990

1. On the claim CBS Liquor Control, Inc. d/b/a Acme Cash Register Company, the sum of $58,896.00 against NCR Corporation.

2. No pre-award interest is allowed.

3. All arbitration administrative expenses and arbitrator's compensation and arbitrator's expenses are hereby awarded against NCR Corporation for this and the companion award. To the extent CBS Liquor Control, Inc. d/b/a Acme Cash Register Company has made prepayment to American Arbitration Association, it is to be reimbursed by NCR as an additional sum of this award.

DATED: November 8, 1990

/s/ Robert E. Ganz
ROBERT E. GANZ

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

On this 8th day of November, 1990, personally came and appeared Robert E. Ganz, to me known and to me known to be the individual described in and who executed the foregoing instrument and he acknowledged that he executed the same.

/s/ Kathleen M. Welch
Notary Public

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration
Between

NCR CORPORATION

and

CBS LIQUOR CONTROL, INC.
d/b/a ACME CASH REGISTER COMPANY

Case No. 15 199 0221 89MJC

AWARD OF ARBITRATOR

I, the undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above named parties and dated July 28, 1982 and having been duly sworn and having duly heard the proofs and allegations of the parties award as follows:

Arbitrator's Awards, November 8, 1990

1. With respect to the claim of CBS Liquor Control, Inc. d/b/a Acme Cash Register Company a punitive damage award in the sum of $1,335,180.00 is made against NCR Corporation.

2. Said award is to be distributed to such persons or entities, on an equal basis, who were non-servicing NCR dealers as of May 25, 1984.

3. NCR shall file an Affidavit of Compliance and a schedule showing the entities to whom this award is to be distributed with names, addresses and amounts so distributed.

DATED: November 8, 1990

/s/ Robert E. Ganz
ROBERT E. GANZ

STATE OF NEW YORK)
) ss.:
COUNTY OF ALBANY)

On this 8th day of November, 1990, personally came and appeared Robert E. Ganz, to me known and to me known to be the individual described in and who executed the foregoing instrument and he acknowledged that he executed the same.

/s/ Kathleen M. Welch
Notary Public

Arbitrator's Awards, November 8, 1990

AMERICAN ARBITRATION ASSOCIATION
Commercial Arbitration Tribunal

In the Matter of the Arbitration
Between

NCR CORPORATION

and

CBS LIQUOR CONTROL, INC.
d/b/a ACME CASH REGISTER COMPANY

Case No. 15 199 0221 89MJC

AWARD OF ARBITRATOR

I, the undersigned Arbitrator, having been designated in accordance with the Arbitration Agreement entered into by the above named parties and dated July 28, 1982 and having been duly sworn and having heard the proofs and allegations of the parties award as follows:

Arbitrator's Awards, November 8, 1990

1. With respect to the claim of NCR Corporation, the sum of $10,710.95 against CBS Liquor Control, Inc. d/b/a Acme Cash Register Company.

2. No pre-award interest is allowed.

3. No administrative expenses or arbitrator's expenses are awarded in favor of either party in this award. They are all awarded in the companion award delivered simultaneously.

DATED: November 8, 1990

/s/ Robert E. Ganz
ROBERT E. GANZ

STATE OF NEW YORK)
)ss.:
COUNTY OF ALBANY)

On this 8th day of November, 1990, personally came and appeared Robert E. Ganz, to me known and to me known to be the individual described in and who executed the foregoing instrument and he acknowledged that he executed the same.

/s/ Kathleen M. Welch
Notary Public

(2)

No. 94-1916

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SAC-CO, INC.,
d/b/a ACME CASH REGISTER COMPANY,
f/k/a CBS LIQUOR CONTROL, INC.,
Petitioner,

v.

AT&T GLOBAL INFORMATION SOLUTIONS COMPANY,
f/k/a NCR CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Where an arbitrator expressly finds that a party is not entitled to punitive damages, then exceeds his authority by awarding punitive damages to non-parties, is it error for a lower court to vacate the punitive damages award in its entirety, rather than modify the award to confer it on the party the arbitrator expressly found was not entitled to such damages?

STATEMENT REQUIRED BY RULE 29.1

1. Petitioner Sac-Co, Inc. conducted business as Acme Cash Register Company and was formerly known as CBS Liquor Control, Inc. ("Acme").

2. Respondent AT&T Global Information Solutions Company is a wholly-owned subsidiary of AT&T Corp. and was formerly known as NCR Corporation ("NCR"). AT&T Corp. owns an equity interest in the following publicly traded companies:

> Compagnie Industriali Riunite, S.p.A. (Italy); and
> AT&T Capital Corporation.

AT&T owns an equity interest in the following non-publicly traded companies, which have public debt outstanding:

> AT&T Credit Corporation;
> AT&T Global Information Solutions Company (formerly NCR Corporation); and
> McCaw Cellular Communications, Inc.

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IN THE

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OCTOBER TERM, 1994

No. 94-1916

SAC-CO, INC.,
d/b/a ACME CASH REGISTER COMPANY,
f/k/a CBS LIQUOR CONTROL, INC.,
Petitioner,

v.

AT&T GLOBAL INFORMATION SOLUTIONS COMPANY,
f/k/a NCR CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

In the decision below, the Sixth Circuit held that a magistrate properly vacated part of an arbitration decision awarding punitive damages to entities that were not parties to the arbitration. The lower court's disposition of this highly unusual award does not conflict with the decisions of any other court of appeals and raises no issues worthy of this Court's review.

1. In 1989, respondent sued petitioner Acme for monies due and owing under a promissory note and deferral payment agreement. After petitioner filed a counterclaim alleging various unfair competition and tortious interference claims, respondent moved to arbi-

trate the entire dispute. At the conclusion of the arbitration proceedings, the arbitrator issued a decision and three separate awards. Two of these awards—one awarding respondent $10,710 on its claim and another awarding petitioner $58,896 plus expenses on its counterclaim—were confirmed below and are no longer at issue.

In the third award, the arbitrator assessed punitive damages totalling $1,335,180 against respondent. The arbitrator expressly stated that these damages were *not* to be awarded to petitioner, but rather were entered in favor of entities who were not parties to the arbitration. The arbitrator stated:

> It should be specifically noted that the damages which I have labeled punitive, I have awarded against NCR. *I have not awarded them in favor of Acme* and that is a conscious decision. It is not acceptable, in this Arbitrator's view, to give [Acme] a windfall simply in order to accomplish the deterrence role of punitive damages. Pet. App. at A66 (emphasis added).

The arbitrator acknowledged that an award of punitive damages to non-parties was "unique," but emphasized that he had fashioned the award in this manner to avoid any "unjust[] reward or . . . windfall to Acme." Pet. App. at A64. Punitive damages would amount to a "windfall" for petitioner, he explained, because "[t]here was simply not a sufficient level of probative and credible evidence upon which an Arbitrator could rationally decide that NCR had wronged Acme with respect to any specific transaction." Pet. App. at A47. Apparently anticipating that his unique punitive damages award to non-parties was beyond his authority, the arbitrator included a provision permitting severance of any portion of the decision or awards found to be void, illegal, or beyond his power.

2. In motions filed in the District Court below, both respondent and petitioner agreed that the arbitrator had

exceeded his authority by awarding punitive damages to non-parties. Respondent sought to have this separate award vacated in its entirety. Petitioner, by contrast, sought to have vacated or severed only that part of the punitive damages award naming the recipients of those damages. The result of such relief would be to confer the entire award of punitive damages on petitioner.

The magistrate vacated the punitive damages award in its entirety and denied petitioner's motion for "partial" vacatur, as well as petitioner's subsequent motion for reconsideration or, in the alternative, for a remand. On appeal, the Sixth Circuit affirmed. The court found that "the arbitrator exceeded his authority by resolving a dispute which may or may not have existed between [respondent] and its other nonservicing dealers, and by determining the rights of individuals who were not parties." Pet. App. at A7. The award was thus properly vacated under both Section 10 of the Federal Arbitration Act, which provides that awards may be vacated "[w]here the arbitrators exceeded their powers" (9 U.S.C. § 10(d)), and Section 11, which permits modification "[w]here the arbitrators have awarded upon a matter not submitted to them" (*id.* at § 11(b)). Pet. App. at A8.

The Sixth Circuit also upheld the lower court's refusal to vacate only that part of the punitive damages award naming the recipients of those damages, reasoning that such a "partial" vacatur would result in an improper modification. Pet. App. at A7-A8. The court noted that judicial authority to modify arbitration awards derives solely from Section 11, which does not authorize modifications that "affect[] the merits of the controversy." Pet. App. at A8. The court reasoned that "vacating the award to the nonparties would result in an over $1 million dollar judgment to Acme; clearly a modification that would affect 'the merits of the controversy.'" *Id.* And such a modification would frustrate, rather than effectuate, the intent of the arbitrator, for it "would provide the windfall

to Acme which the arbitrator expressly rejected." *Id.* The court further held that severing only that part of the award that named the recipients of the punitive damages would likewise constitute an improper modification, and that the "severance" provision of the award could not be used to trump the language of Section 11. Pet. App. at A9. Finally, the court held that the magistrate properly declined to remand the award, inasmuch as the arbitrator had unambiguously expressed his intent that petitioner was not to receive the award of punitive damages. *Id.*

3. Petitioner's claim that the Sixth Circuit's unremarkable and manifestly correct decision warrants review by this Court is without merit. The decision below is fully consistent with the "partial vacatur" line of authority petitioner cites. Petitioner's cases do not involve situations in which courts "vacated" selected phrases and words that were integral to the arbitration awards under review; rather, these cases involved the vacatur of separate and independent parts of an award. See *Enterprise Wheel & Car Corp.* v. *United Steelworkers,* 269 F.2d 327, 330 (4th Cir. 1959) ("if the award exceeds the scope of the arbitration agreement it is not invalid *in toto* but only so far as it is excessive, *if* it is of such character that the court can separate the part within from the part beyond the submission") (emphasis added; citations omitted), *rev'd in part on other grounds,* 363 U.S. 593 (1960); *Moyer* v. *Van-Dye-Way Corp.,* 126 F.2d 339, 341 (3d Cir. 1942) ("[i]t may also be taken as established that if the arbitrator has failed to execute his entire commission *and* that which he has done does not stand alone but depends upon the part unsettled, the award, as a whole, must fall") (emphasis added; citations omitted); *Puerto Rico Maritime Shipping Auth.* v. *Star Lines Ltd.,* 454 F. Supp. 368, 372 (S.D.N.Y. 1978) ("if an award is valid in part and invalid in part, *and* the valid portion concerns claims that are 'separable' from and 'non-depend-

ent' on claims covered by the invalid portion, the valid portion of the award is confirmable") (emphasis added; citations omitted). That is precisely what the Sixth Circuit did here by vacating the "separable" and "independent" part of the award—*i.e.*, the punitive damages portion—and allowing the remaining, valid portions—the compensatory awards—to stand.

Nor did the lower court err by considering whether the "partial" vacatur petitioner sought would "affect[] the merits of the controversy" within the meaning of Section 11. To "vacate" only that part of an award naming the recipients, and thereby grant the award to a party the arbitrator expressly identified as undeserving of it, is plainly an act of "modification" governed by Section 11. Indeed, although petitioner claims that no other court has decided when a proposed modification "affects the merits of the controversy" (Pet. at 11) or viewed Section 11(c) as a limitation of judicial authority (*id.* at 10), one of the very cases petitioner cites does both of these things in a manner completely consistent with the decision below.[1] The Sixth Circuit correctly concluded that it is improper, and beyond a court's authority, to change an arbitration award in a manner that renders it flatly inconsistent with the unambiguously expressed intent of the arbitrator,[2] and petitioner cites no case or authority to the contrary.

---

[1] In *Diapulse Corp. of Am.* v. *Carba, Ltd.*, 626 F.2d 1108 (2d Cir. 1980), the Second Circuit concluded that Sections 10 and 11 do not permit courts to alter the scope of an arbitration award. The court dismissed the suggestion (similar to petitioner's here) "that the district court's revision of the arbitration award, which transformed a very broad non-competition injunction into a relatively narrow one, did not affect matters of substance that were at the heart of the controversy," and held that "[t]his sort of judicial intervention into the arbitral process is precisely what the narrowly defined provisions of sections 10 and 11 were designed to *prevent*." *Id.* at 1110 (emphasis added).

[2] Given the arbitrator's clear intent, the courts below did not err by refusing to remand the case for clarification, a remedy that

The decision below raises no issues worthy of this Court's attention. Petitioner itself refers to the arbitrator's punitive damages award to non-parties as "an absurd, *ultra vires* experiment" in which the arbitrator engaged in "aberrant behavior" to "dispense his own brand of industrial justice." Pet. at 14-15. Even the arbitrator referred to his punitive damages award as "unique to [his] own research." Pet. App. at A64. The decision below was plainly correct and involves unique facts that are unlikely to recur.[3]

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is not only discretionary and disfavored (*see Flender Corp.* v. *Techna-Quip Co.*, 953 F.2d 273, 280 (7th Cir. 1992); *Colonial Penn Ins. Co.* v. *Omaha Indem. Co.*, 943 F.2d 327, 334 (3d Cir. 1991)), but appropriate only where the arbitrator's award is ambiguous. *Brown* v. *Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 780 n.4 (11th Cir. 1993); *United Steelworkers* v. *New Idea Farm Equip. Corp.*, 917 F.2d 964, 968 (6th Cir. 1990); *Olympia & York Fla. Equity Corp.* v. *Gould*, 776 F.2d 42, 45 (2d Cir. 1985). In all events, the question whether this particular case should have been remanded is manifestly not one requiring this Court's attention.

[3] Petitioner's suggestion that the lower court's decision leaves adversely affected entities without a remedy is likewise wrong. Because an arbitration is not binding upon non-parties and has no preclusive effect on them (*International Bhd. of Elec. Workers* v. *O.K. Elec. Co.*, 793 F.2d 214, 216 (8th Cir. 1986); *Kurt Orban Co.* v. *Angeles Metal Sys.*, 573 F.2d 739, 741 (2d Cir. 1978)), the non-parties (other dealers) are not precluded by the vacatur of the punitive damages award from pursuing any remedies they might have against respondent.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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June 22, 1995

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No. 94-1916

(3)

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IN THE

Supreme Court of the United States

October Term, 1994

SAC-CO INC., d/b/a ACME CASH REGISTER COMPANY,
f/k/a CBS LIQUOR CONTROL, INC.,

Petitioner,

against

AT&T GLOBAL INFORMATION SOLUTIONS COMPANY,
f/k/a NCR CORPORATION

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BEST AVAILABLE COPY

PETITIONER'S REPLY BRIEF

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SUPREME COURT OF THE UNITED STATES
October Term, 1994

No. 94-1916

Sac-Co, Inc.,
d/b/a Acme Cash Register Company,
f/k/a CBS Liquor Control, Inc.,

Petitioner,

v.

AT&T Global Information Solutions Company,
f/k/a NCR Corporation,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

Petitioner's Reply Brief

Respondent has barely touched upon the factors relevant to the Court's consideration of whether to grant the Petition for Writ of Certiorari. Rather than grapple with the split in the circuits as to how to analyze arbitration awards which are invalid only in part, respondent simply asserts, without real analysis, that the rule applied by the other Circuits is consistent with that applied by the Sixth Circuit in this case. *Respondent's Brief* at

4-5. Respondent is wrong. The other courts to address the question have analyzed it under §10 of the Federal Arbitration Act, favoring the approach of vacating only the offending portion of the award. The Sixth Circuit rejected that approach and analyzed it as a matter of "modification" under §11. The circuits are thus split. *See Petition* at 8-10.

Most of respondent's brief addresses the merits of the argument. Certainly, the merits will be fully briefed and argued should the Court decide to grant the Petition. However, one "fact" asserted by respondent in several places is misleading and must be corrected. Respondent claims that "the arbitrator * * * unambiguously expressed his intent that petitioner was not to receive the award of punitive damages." *Respondent's Brief* at 4. This is simply not the case. Even were the arbitrator's award enforced as written, Acme would have received some *or all* of the punitive damages award, depending upon how many other non-servicing dealers there were. His invalid *intent* was that Acme not get all of the punitive damages if, indeed, other non-servicing dealers existed. The Court of Appeals wrongly concluded that it must effectuate that invalid intent by vacating the award in its entirety, thus frustrating the arbitrator's valid intent that NCR pay punitive damages.

Respondent contends, finally, that this case is too unusual to warrant review by this Court. The themes presented by the case, however, are universal in their application to the world of commercial arbitration. When an arbitrator does something that is beyond his power, what should the reviewing court do with it? Should the award be severed and the valid portion enforced, or should it simply be vacated? Should the analysis take place under §10 or §11? Should the victim of an invalid experiment, such as Acme, be left without further remedy, or should a mechanism exist to minimize the damage done? AT&T, rightly

punished by the arbitrator, attempts to escape that punishment by resort to technicality and evasion of the true issues.

Summary and Conclusion

It is respectfully requested that the Petition be granted.

Respectfully submitted,

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